

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

NETWORK-1 TECHNOLOGIES, INC.)
-vs-) DOCKET NO. 6:13cv72
Tyler, Texas
12:59 p.m.
HEWLETT-PACKARD COMPANY, ET AL May 14, 2018

TRANSCRIPT OF POST-TRIAL MOTIONS HEARING
BEFORE THE HONORABLE ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 Mrs. Schroeder, please call the case for us.

4 THE CLERK: Case No. 6:13cv72, Network-1
5 Technologies, Inc. v. Hewlett-Packard Company, et al.

6 THE COURT: Announcements for the record.

7 MS. FAIR: Good afternoon, Your Honor. Andrea Fair
8 on behalf of the Plaintiff. Here with me Mr. Greg Dovel,
9 Ms. Christin Cho, and Mr. Jonas Jacobson. We are ready to
10 proceed at the Court's --

11 THE COURT: Good afternoon, welcome.

12 MS. DOAN: Your Honor, for HP, Jennifer Doan Josh
13 Thane, Kyle Akin also from our office, Mr. Hersch Mehta from
14 McDermott Will & Emery and his partner Natalie Bennett, and
15 then Mr. Mark Ouweleen from Bartlit Beck, and Tim Foster our
16 able paralegal.

17 THE COURT: Welcome.

18 MS. DOAN: Also in the courtroom, Your Honor, is
19 Ms. Vaishali Udupa and Mr. Grant Ritz, also in-house for
20 HP.

21 THE COURT: Good afternoon, everybody. Thank you
22 for coming to Texarkana.

23 We are here this afternoon for argument on two
24 motions, the Plaintiff's motion for new trial on
25 infringement, which is Docket No. 98; and the Plaintiff's

1 motion for judgment as a matter of law and new trial on
2 invalidity, which is Docket No. 99.

3 We are also, tomorrow, hearing the bench trial on
4 inequitable conduct, and I know that the parties had filed a
5 joint motion to adjust the deadlines with respect to
6 tomorrow's bench trial, including changing some of the
7 deadlines related to that. So that motion will be granted.

8 And then I know that there was a motion filed by
9 the Plaintiff asking us to limit the inequitable conduct
10 trial tomorrow to any theories raised by the Defendant in its
11 complaint and in the pretrial order.

12 I understand that the Defendants have filed a
13 response to that. We will take a look at that. And then I
14 have suggested to the Plaintiffs that they will have an
15 opportunity to reply if they so desire.

16 So I think that completes my preliminary comments.
17 Unless the parties have anything that we need to address
18 before we begin argument on the motions, we will do that now.

19 MR. DOVEL: Good afternoon, Your Honor.

20 THE COURT: Good afternoon.

21 MR. DOVEL: Your Honor, we are asking the Court to
22 grant JMOL that the patents -- that the claims asserted in
23 the patents were not obvious, and the patent is valid.

24 Your Honor, as you are aware, the question of
25 obviousness is a question of law, so what do we do with the

1 jury's finding on that?

2 As the Federal Circuit held in the Richardson case,
3 it says: We assess the record evidence in the light most
4 favorable to the verdict winner. But this does not mean that
5 we are free to abdicate our role as the ultimate decision
6 maker on the question of obviousness. That decision remains
7 within our province.

8 So the Court has not yet ruled on obviousness.
9 That is one of the things we are asking the Court to do is to
10 issue a ruling that as a matter of law the asserted claims
11 were not obvious.

12 Now, the first point I am going to address, Your
13 Honor, relates to the Fisher System. As an overview, we
14 argue in our papers that there are five important fundamental
15 flaws in their obviousness case, any one of them means as a
16 matter of law the claims were not obvious. I am going to
17 spend time on four of those today.

18 The first is the Fisher System. To assert the
19 Fisher System they have got to establish that it is prior
20 art. They don't dispute that. They also don't dispute that
21 their only assertion that it was prior art is under Sections
22 102(a) and (b) where they assert it was prior art because it
23 was in public use. The Fisher System, they assert, was in
24 public use.

25 And just to be clear, I put on the board the

1 Federal Circuit's controlling authority in the Woodland case
2 often cited by the Federal Circuit about what this means.
3 And they say under Section 102(a): In order to invalidate a
4 patent based on prior knowledge or use, that knowledge or use
5 must have been available to the public. The language "known
6 or used by others in this country" means knowledge or use
7 which is accessible to the public.

8 It is not enough to establish that the Fisher
9 System was used. They have got to establish with evidence,
10 clear and convincing evidence, that that use was public. It
11 was accessible to the public.

12 So I am going to spend just a minute discussing
13 with Your Honor what the law tells us what it means for use
14 to be public and not public.

15 In the Dey case the Federal Circuit held that: If
16 members of the public are not informed of and cannot readily
17 discern the claimed features, the public has not been put in
18 possession of those features. To be a public use it has to
19 be used where members of the general public can readily
20 discern the claimed features.

21 Public use in the Clock Spring is an example of a
22 case where the Federal Circuit found there was public use.
23 In that case there was a demonstration of the product in
24 public. There were representatives of competitors who
25 watched the demonstration. That made it accessible to the

1 public.

2 Now, what are examples where the use is not public
3 as a matter of law? Here are two that are directly on point,
4 Your Honor. We have got them on our Slide 6. First is the
5 Invitrogen case. The Court held that the fact that
6 Invitrogen secretly used the cells internally to develop
7 future products that were never sold, is insufficient to
8 create a public use.

9 Using a system internally to accept future products
10 is not a public use. That is not a use that is accessible to
11 the public. That is an internal use.

12 Another case that provides great guidance to this
13 Court, it is another ruling by the Federal Circuit as a
14 matter of law, is the Allied Colloids case.

15 In that case, Your Honor, the -- there was a use
16 made of this -- this claimed set of chemicals that were used
17 in a sewage system. And the way they tested them was to take
18 them to a public municipal sewage system at the City of
19 Detroit, their plant, and put the chemicals in and do tests
20 on it.

21 And even though that was something that was open
22 and available, the Federal Circuit held as a matter of law
23 that is not a public use. Why not? The tests were not
24 observed by anyone other than Colloids' employees, the
25 Federal Circuit said.

1 Representatives of the City of Detroit were there
2 at the municipal plant, but no witness testified that anyone
3 other than Colloids' employees conducted or observed the
4 experiments. As a matter of law that is non-public use.

5 If there is no witness that testifies that the use
6 was observed or conducted by outsiders by members of the
7 general public, it is a non-public use.

8 Now let's turn to the evidence here. What is
9 evidence -- what is HP's evidence of public use? In fact,
10 the only thing they point to is evidence of use, not public
11 use.

12 Here is from their brief, Your Honor. It is on our
13 Slide 7. They say that: Fisher testified that 3Com actually
14 implemented powering an access device using PoE, and then
15 they cite seven lines of testimony. And here are those seven
16 lines of testimony. We have it on the board now.

17 In this testimony Fisher says -- was asked: Did
18 you actually implement powering an access device using Power
19 over Ethernet technology in 1996? And he says: Well, we
20 probably had it working in '95. This was the second
21 generation that was done in '96. But, yeah, we probably had
22 it done.

23 Your Honor, this is testimony from Fisher to using
24 the system. But there is not a word of mention that the use
25 was publicly accessible; that it was open to the general

1 public; the members of the general public attended. There is
2 not a single word, clause, or sentence from which you could
3 infer public use in this testimony. That is it, Your Honor.
4 That is the sole testimony they rely upon for Fisher.

5 What they don't do is cite any of the testimony
6 where Fisher describes in the details of what they were
7 doing. What was he using it for? And the reason they don't
8 cite that, Your Honor, is because Fisher consistently
9 described that the purpose of his using it was non-public.
10 It was for internal development of a system at 3Com.

11 Here are the words he used. He said it was for
12 research or development. He said this was a prototype.
13 There was hardware that was in development. The use was in
14 order to test it. It did not go to product. 3Com exited the
15 space. All of this testimony describing what the use was is
16 consistent with this, Your Honor.

17 This is every clause in the transcript, the trial
18 transcript, where he describes why he was using it and how he
19 was using it, for research and development, a non-public use.
20 That is Fisher, Your Honor.

21 Fisher was the only witness they called who was
22 around at the time who could provide any testimony about the
23 use. They have no testimony, and they provided no documents
24 showing use. That's it. The Court should grant our motion
25 as a matter of law that Fisher was not in public use, they

1 haven't proven it; therefore, Fisher is not prior art.

2 Now, in addition, they said our expert testified
3 about this, Dr. Neikirk. But, Your Honor, Dr. Neikirk was
4 not there in '95 or '96. He wasn't a witness to anything.
5 He can't testify as a percipient witness. And if he
6 testifies as an expert, he can't simply give a conclusion.
7 Conclusions from an expert are given no weight.

8 What is it that they rely upon from Dr. Neikirk?
9 Here it is. I have reproduced that portion of the brief so
10 Your Honor can see it. Here is the testimony they rely upon
11 from Neikirk.

12 QUESTION: Dr. Neikirk, was Mr. Fisher's system,
13 was it in public use?

14 ANSWER: Yes, I believe it was.

15 Your Honor, that is a classic example of a pure
16 conclusion. There is no articulated reasoning. It is
17 simply, yeah, I believe it was. But he had no basis to
18 articulate as to why there was a public use because there was
19 literally no evidence of public use. All he could say was,
20 yeah, I believe it was in public use. That conclusion as a
21 matter of law fails.

22 The Federal Circuit's Upjohn case, for the
23 determination of obviousness there must be factual support
24 for an expert's conclusory opinion. Lack of factual support
25 for expert opinion going to factual little probative value.

1 Such conclusory expert testimony cannot support an
2 obviousness conclusion. That is the holding of the Federal
3 Circuit in Duke University. You cannot employ mere
4 conclusory statements.

5 In ActiveVideo the Federal Circuit again held, the
6 obviousness testimony by the Defendant's expert was
7 conclusory and fatally unsupported. He never provided any
8 factual basis for his assertions. Therefore, they are
9 disregarded as a matter of law, Your Honor. That is what
10 they point to from Neikirk.

11 Now, they to point to one other thing. They say,
12 well, we presented evidence of the hardware. We had the
13 actual hardware in Court. And here it is. I presented it on
14 our Slide 12. This is a photograph of it. But it provides
15 no evidence of public use, Your Honor. The fact that there
16 is hardware sitting on a desk says nothing about whether a
17 use of it in '95 and '96 was open to the public.

18 Now, HP they say, well, one of the circuit boards
19 had a copyright notice, a copyright symbol on it "c" with
20 1996. It said: All rights reversed. And I have reproduced
21 that on Slide 13.

22 And this is what they argued to Your Honor when we
23 brought our JMOL before the verdict. We requested the Court
24 to give us judgment as a matter of law because they had no
25 evidence of public use. And HP made exactly one argument. I

1 reproduced it here on the screen for Your Honor, and the
2 argument is simply a false assertion. The sole argument was
3 that the system had copyright etched into the machine that
4 said 1996 indicating that the Copyright Office had reviewed
5 it and that it was available.

6 What their assertion is that, well, we had this
7 copyright symbol, that means we registered it. To register
8 we had to send the system to the Copyright Office, and they
9 used it.

10 There was no evidence of that, and all those
11 inferences, in fact, are wrong as a matter of law, Your
12 Honor.

13 Let me go through that.

14 First of all, as a matter of law, putting the
15 copyright symbol on something does not imply registration.
16 We quote the cases, we quote the relevant statutes that state
17 unequivocally that registration with the Copyright Office is
18 not required before adding the symbol on a work.

19 So putting that symbol doesn't mean that HP
20 registered it. If it had been registered what you would see
21 is an application and registration certificate. There was no
22 evidence of an application or registration certificate. HP
23 certainly would have provided that if there was one.

24 The only inference that can be reasonably arrived
25 at is it was not registered. There is no evidence of

1 registration. Moreover, if they had sought to register that
2 circuit board, as a matter of law they would not have sent
3 the circuit board in because the Copyright Office does not
4 accept tangible articles like circuit boards. That is not
5 how you register them. You send in a photograph of it. They
6 have no ability to accept it.

7 And if 3Com for some reason had sent that circuit
8 board in to try and register it, it doesn't mean that there
9 was any public use. The Copyright Office is not going to
10 take that circuit board and put together a system and fire it
11 up and run it. The fact that there was a copyright symbol is
12 not evidence of public use as a matter of law. That is the
13 sole argument they made pre-verdict on this, and it is simply
14 wrong.

15 Now, the next point I want to address, Your Honor,
16 is a misstatement of the law that they make in their brief.
17 I want to address this. We explain it in our brief, I think,
18 very well, but I want to address it because there shouldn't
19 be any confusion on this. I want to point out that a
20 district court did get confused on this and did get reversed
21 by the Federal Circuit. We don't want that to happen here.

22 What they quote in their response is this: Any use
23 of the claimed invention by a person other than the inventor
24 who is under no limitation, restriction, or obligation of
25 secrecy to the inventor, is a public use.

1 And they say then that Fisher's use of the system
2 with others at 3Com would, therefore, be a public use. What
3 they are suggesting is this language from this Federal
4 Circuit case means that if Fisher and his colleagues at 3Com
5 are using it, that makes it a public use because they are not
6 under any obligation of secrecy to the inventor of our
7 patent, to the inventor of the '930 patent, Mr. Katzenberg.

8 But the Federal Circuit has held that that is
9 simply the wrong way to understand what this law is about.
10 And they reversed the Federal Circuit for that -- or reversed
11 a district court who did exactly that. This is in the Dey
12 case. I reproduced on the screen now the relevant portion
13 from that Dey case.

14 And the Federal Circuit said: The district court's
15 decision was the result of misconceptions about the reach of
16 Section 102. It says: The district court's findings were
17 based on language from our cases stating that public use
18 includes any use of the claimed invention by a person other
19 than the inventor who is under no limitation, restriction, or
20 obligation of secrecy to the inventor. It is the exact
21 language that HP quoted.

22 And the Federal Circuit then held: Those
23 statements are not meant to apply to third-party use cases.
24 That is, if Katzenberg were using the invention before the
25 filing of the patent, then there would be a question of were

1 other people under an obligation to him? But that is the not
2 the case here. We have a third party that is purportedly
3 using the invention, a third party being 3Com and Fisher.

4 As the Federal Circuit went on to hold in Dey, even
5 in the case of third-party uses, being accessible to the
6 public still requires public availability. It is not enough
7 that Fisher and 3Com made a use. Their use must have been
8 made available to the public.

9 As the Federal Circuit held: When the alleged
10 public use is performed by an unaffiliated third party rather
11 than the inventor, such use must still be publicly
12 accessible. That is from the 2015 Delano Farms case.

13 So their quoting of that language and misusing it,
14 is wrong as a Federal Circuit law. The Federal Circuit has
15 directly addressed it and reversed the district court who
16 followed that approach. They have to show that any use by
17 Fisher at 3Com was accessible to the public. That's what
18 would make it a public use.

19 Fisher's use at 3Com is not a public use, not
20 unless they have evidence that members of the public attended
21 the demonstrations, attended the use, and that they had made
22 it accessible to the public.

23 Now, HP in surreply they say, well, there was no
24 evidence that the Fisher System was confidential or secret.
25 There is two problems with this one. The first one is a

1 legal problem. This reverses the burden of proof. For them
2 to establish that Fisher's prior art, they have to show by
3 clear and convincing evidence that the use was public. It is
4 not enough for them to show a use. They have the burden to
5 show a public use.

6 We don't have to come in and say, well, you showed
7 a use, now it is our burden to show that it was confidential.
8 No. HP, as the proponent of the argument that the patent was
9 invalid because of Fisher, has the burden of proving that
10 there was a public use.

11 Here is the Federal Circuit cases that we cite on
12 that point directly. The Defendant had the burden to show by
13 clear and convincing evidence that the inventors placed their
14 invention in public use.

15 Here is another case, Tone Brothers. The party
16 asserting the public use bar has the initial burden of
17 showing by clear and convincing evidence facts which support
18 the existence of a public use. They haven't done that, Your
19 Honor.

20 The second problem, Your Honor, is that the only
21 evidence that was in the record is evidence from which you
22 could infer that it was confidential. As I showed before,
23 Fisher's testimony about the use was that it was for research
24 or development, they were developing a prototype of a
25 product.

1 The only reasonable inference is that HP would keep
2 that confidential. HP is not in the business of developing
3 products and inviting their competitors in to see them before
4 they release the product. That is not ordinary business
5 behavior, and there is no testimony suggesting that HP
6 decided while developing this product, conducting research
7 and development, preparing this prototype, that they decided
8 to invite the public in or invite competitors in or invite a
9 journalist in to write an article about it. None of those
10 things. No evidence of public use.

11 The other piece of evidence that bears heavily on
12 this, Your Honor, is the patent application that 3Com filed
13 on May 29th, 1997. To file that patent application, 3Com
14 necessarily did not engage in any prior public use that could
15 act as a bar to their own patent.

16 So prior to May 29, 1997, the only reasonable
17 inference is that 3Com did not engage in a prior public use.
18 They kept it confidential. And when was it that Mr. Fisher
19 testified his use was at 3Com? Unequivocally, '95 and '96.
20 So Fisher's use in '95 and '96 was non-public. There was no
21 evidence, no evidence of a public use of the Fisher System.
22 All evidence pointed to the fact that it was a non-public use
23 by 3Com in developing a product.

24 There is yet another hurdle they have got to
25 overcome, Your Honor, and that is corroboration. It is not

1 enough to come in when you are talking about facts that are
2 this old and have one witness testify about it.

3 Here is the Federal Circuit in Finnigan talking
4 about the requirement of corroboration that: Testimony
5 concerning invalidating activities can be unsatisfactory due
6 to the forgetfulness of witnesses, their liability to make
7 mistakes, their proneness to recollect things as the party
8 calling them would have them recollect them. For that reason
9 corroboration is required.

10 They had one witness on this subject, Fisher. They
11 didn't have two. As a matter of law, they lose. There was
12 no corroboration.

13 The Federal Circuit in Finnigan specifically held
14 that corroboration is required on the issue of public use. A
15 witness's uncorroborated testimony is equally suspect if he
16 testifies concerning the use of the invention in public or
17 use the invention in public, 102(b).

18 In that particular case they reversed. They said:
19 What we are left with is Jefferts' testimony concerning his
20 alleged public use. Such evidence is insufficient as a
21 matter of law.

22 So that was a case where they actually had a
23 witness who did provide testimony about a public use. The
24 Federal Circuit said as a matter of law that fails. It
25 wasn't corroborated.

1 They need to put on evidence of public use, and
2 then they need to do it twice. They need two forms of
3 evidence, any evidence and corroboration. They don't have
4 any, Your Honor.

5 Let me show you what their purported corroboration
6 is. This is from the trial transcript. I put it on the
7 screen. It is our Slide 27.

8 Dr. Neikirk was asked: Has it been corroborated
9 here that it was in public use?

10 Here is what he says: Yes, Dr. Fisher told us this
11 morning that they built a system, they plugged it into the
12 network at their offices and used it.

13 So this is not corroboration. This is Fisher
14 himself talking about it. This is not corroboration of
15 Fisher. And it is not about a public use. This is Fisher
16 describing a non-public use.

17 They plugged it into the network at their offices
18 and used it, not plugged it into a public space and
19 demonstrated it to the public, not invited miscellaneous
20 third parties to come in and observe them using it, that they
21 plugged it into their network in their offices and used it.
22 That is not corroboration, and it is not testimony about
23 public use.

24 Now, because there was no evidence of public use,
25 the Court is required as a matter of law to conclude that the

1 Fisher System was not proven to be prior art. That means the
2 Fisher System has to be eliminated and not considered in
3 their obviousness contentions.

4 And what they are left with then is the Fisher
5 patents, Woodmas patent, and Chang patents. That
6 combination, Your Honor, they are estopped on. We moved for
7 JMOL of estoppel specifically on this before the verdict.
8 And they should have been estopped from presenting that.

9 The statute 35 USC 315 provides that they are not
10 able to raise before the jury any grounds that they raised or
11 reasonably could have raised during the IPR, anything they
12 reasonably could have raised.

13 Well, they knew about these grounds, these patents,
14 and could have raised them during the IPR. We know that
15 because here is their invalidity contentions dated December
16 19th, 2012. And on them they identify Chang and Fisher and
17 Woodmas. They were fully aware of those references in
18 December of 2012.

19 And this Court's holding on a similar motion
20 earlier is controlling on this. As this Court ruled and I
21 will quote the Court's own order, HP disclosed each reference
22 in its invalidity contentions on December 19th, 2012.
23 Therefore, HP reasonably could have raised each invalidity
24 ground before the PTAB. That means they are estopped on
25 those invalidity grounds.

1 If they are estopped on those grounds, that is the
2 end of their obviousness case. Fisher is not prior art. The
3 remaining patents they are estopped on. JMOL should have
4 been granted pre-verdict, and it should be granted now. As a
5 matter of law, their obviousness case fails.

6 Now, Your Honor I want to turn to the next part of
7 our motion, which is it fails for additional reasons, in that
8 they failed to prove necessary elements in order to establish
9 obviousness.

10 They have argued that we waived these. I am going
11 to address the waiver after I address the merits of these
12 because understanding the waiver will be easier in light of
13 understanding exactly what the issues are.

14 The first missing element is low level current.
15 They didn't establish in their combination that it had a low
16 level current, applying evidence, using evidence that applied
17 the Court's construction.

18 In order to satisfy this requirement of proving
19 that their prior art had a low level current, they would need
20 to have an expert testify and apply the Court's construction
21 and demonstrate where each part of the construction was
22 satisfied in the prior art reference.

23 They didn't offer any such testimony. The Federal
24 Circuit has held, this is an example, in the Aspex case, this
25 is not a one of the rare cases where the invention is so

1 simple that expert testimony is not required. The party
2 asserting invalidity has the burden of introducing such
3 evidence, such expert testimony. Expert testimony is
4 required for a technical patent like this.

5 In the Koito case the Federal Circuit reversed the
6 district court. Why? Because the district court erred in
7 concluding that explanatory testimony from the expert
8 relating to the prior art reference of the patent was
9 unnecessary. It would be error for this Court to do so as
10 well. They have to introduce explanatory testimony that
11 relates to the prior art reference to the patent.

12 The Federal Circuit held that general and
13 conclusory testimony does not suffice as substantial evidence
14 of invalidity.

15 Same thing in ActiveVideo, and I urge Your Honor to
16 look at ActiveVideo. The facts are very similar in this
17 regard. As they point out, the testimony provided by the
18 expert was conclusory and lacked sufficient technical detail.
19 For that reason it had to be disregarded, justifying JMOL.

20 Now, on this issue of low level current, the Court
21 required that it must be a non-data-signal current that is
22 sufficient to begin start up of the access device but that is
23 not sufficient to sustain the start up.

24 Their expert, Dr. Neikirk, at no time applied that
25 construction except when I asked him about it -- and you will

1 see that testimony later -- when he admitted it wasn't found
2 in their references.

3 But in their testimony that they point to he
4 doesn't say, aha, here in Woodmas this is a current that is
5 sufficient to begin start up of the access device. He
6 doesn't even make that conclusory assertion, much less show
7 it.

8 There is no testimony from Neikirk showing that the
9 Woodmas current -- that was the one that they alleged was
10 going to satisfy this -- there is no testimony that it was
11 sufficient to begin start up of the access device. Without
12 that testimony, under Federal Circuit law, their obviousness
13 case fails as a matter of law. They need explanatory
14 testimony applying that by their expert. Their expert didn't
15 do it. They failed as a matter of law.

16 What HP relies upon instead -- and I have
17 reproduced it from the brief on Page 57 -- is the barest
18 conclusory testimony from Neikirk where he says: The Woodmas
19 is clearly teaching us a great deal about low level currents,
20 and I'll go ahead and check off low level current. We'll see
21 that it's truly the low level current as construed by the
22 Court when we look at that combination.

23 All he is doing is saying, yeah, I found the low
24 level current, but he at no point applies the Court's
25 construction and says, aha, this is a low level current. We

1 simply have his bare conclusions. And those bare conclusions
2 as a matter of law as the Federal Circuit has done in four
3 other cases, those bare conclusions have to be disregarded.
4 They are not sufficient evidence. They are given no weight.

5 Now, in addition when he gave us conclusions, they
6 were always qualified. He always threw in, well, there would
7 be a low level current if we used -- if we do this the way
8 that Network-1 did in its infringement theory or the way
9 Dr. Knox did in his infringement theory.

10 And what those qualifications were referring to --
11 and I will go to our Slide 60 now -- is that Dr. Neikirk
12 asserted that the theory that Network-1 was using was that it
13 merely has to be a current that is used in a detection
14 process. And he described that as an erroneous construction.

15 And it certainly would be. We can compare it to
16 the Court's construction, and it is not the same thing at
17 all. If you merely establish that a current is used in a
18 detection process, that would not establish that it was
19 sufficient to begin start up.

20 And for that reason they never asked Dr. Neikirk to
21 go further and try to actually apply the Court's construction
22 before the jury.

23 In closing argument HP gave us a telling admission
24 on this very point. They said that: This construction
25 applied by Neikirk was just sufficient -- was just current

1 sufficient to go through the detection circuitry. That's
2 completely different to what Judge Schroeder says. Judge
3 Schroeder says it has to begin start up of the access device.
4 Not current sufficient to go through the detection circuitry.

5 So that is an admission that this erroneous
6 construction is not the same thing as the Court's
7 construction. It is completely different as to what Judge
8 Schroeder says. Judge Schroeder requires that it be
9 sufficient to begin start up of the access device. That is
10 not mentioned at all in this erroneous construction.

11 Now, what happens if we actually applied the
12 Court's construction? The evidence is undisputed on that,
13 Your Honor. Dr. Neikirk himself admitted what would happen
14 if we applied the Court's construction and looked for a
15 current that would be sufficient to begin start up.

16 And here is his testimony on Slide 68, and this
17 testimony alone should be conclusive on the issue. He was
18 asked this: In your opinion, does Woodmas disclose or teach
19 a low level current using the Court's definition of low level
20 current?

21 His answer: The Court has recommended a
22 construction of low level current, that it's a
23 non-data-signal current that is sufficient to begin start up
24 of the access device but that is not sufficient to sustain
25 start up. I have applied that exactly as it is stated by the

1 Court, to Woodmas.

2 And as I pointed out quite clearly in the Footnote
3 128, it's my opinion that Woodmas's current of 15 milliamps
4 does not start up. So hence, no, Woodmas is not disclosing
5 that low level current as required by the Court. They needed
6 to provide expert testimony applying the Court's definition
7 to Woodmas. They didn't do it.

8 I asked their own expert to apply that. And he
9 said unequivocally, Your Honor, this testimony could not be
10 clearer. I have applied that construction as exactly as it
11 is stated by the Court, and Woodmas is not disclosing that
12 low level current as required by the Court.

13 Moreover, Your Honor, I asked Dr. Neikirk in a
14 series of eight questions to explain exactly why it was that
15 the prior art did not disclose a low level current. And I
16 put -- to help him explain it, I put in the front of him the
17 Figure 1 from Woodmas, which I have got on the board now, and
18 asked Dr. Neikirk about it.

19 And he explained that Woodmas system is going to
20 deliver a current, this 15 milliamp current, from something
21 called the power delivery unit over to the power reception
22 unit. And those are illustrated on this diagram. That is
23 where the current goes between.

24 Now, Dr. Neikirk also explained that over on the
25 far right here in Box 16, that is where we have these remote

1 devices, what would be the access devices; a camera,
2 headphones, a microphone over there.

3 And he was asked this -- going to our Slide 64 --
4 by delivering this 15 milliamp current, does that mean that
5 the current is sufficient to begin the start up of the
6 connected remote device?

7 ANSWER: No. In my opinion, it doesn't. The
8 remote device is not started up by that current.

9 Does the detection current in Woodmas, does it reach
10 any of the items in box 16?

11 His answer: The lower power current provided by
12 the power delivery unit to the power reception unit, no. The
13 current does not flow onto the rest of the circuitry.

14 This current doesn't even -- in Woodmas, doesn't
15 get over to the accused devices. A current can't start up an
16 access device if it doesn't even reach it. And Dr. Neikirk
17 explained the current doesn't even get to the access device
18 so, of course, it doesn't start it up.

19 He confirmed this question: You would agree that
20 there is no current that reaches any of the items in Box 16?
21 Yes, I would, yes.

22 And I went on to identify them specifically.

23 The current does not reach this camera, correct?

24 That's exactly how it is designed, yes.

25 Does not reach the microphone?

1 Correct.

2 Does not reach the headphones?

3 Correct.

4 The Woodmas current doesn't reach any of the remote
5 devices. There is no begin start up.

6 And then he concluded. He was asked this question,
7 which is directly on point, Your Honor: Do you have any
8 basis for concluding that the '930 patent claims are obvious?

9 And here is his answer: Given that the Court said
10 that the low level current must be sufficient to begin start
11 up of the access device, I could not find that element in the
12 art that I used. My opinions would not have all of the
13 elements required for an obviousness conclusion. It is his
14 own admission at trial that if we actually apply the Court's
15 construction, it is not there.

16 Do you have any basis to conclude that the '930
17 patent is obvious, I asked him?

18 He says this: I cannot conclude that it is
19 obvious.

20 QUESTION: It would be valid.

21 ANSWER: It would be valid.

22 They don't have any evidence from an expert or from
23 any witness saying that there is a current in any of their
24 prior art that is sufficient to begin start up of an access
25 device. Their expert didn't testify to that. He testified

1 just to the opposite. Our expert agreed with it. The
2 testimony is uniform on this point. Therefore, there is no
3 evidence supporting an essential element of their obviousness
4 case.

5 Without prior art that has a low level current, one
6 that is sufficient to begin start up, they are missing a
7 fundamental part of the claim; and, therefore, they cannot
8 satisfy their obviousness case, as their own expert admitted.
9 Without that element, he has no basis to conclude that the
10 patent is obvious.

11 And on that point, again, here is another just -- I
12 will say -- I will use the word "devastating," a devastating
13 admission from HP itself. This is HP's own comment in
14 closing argument about that, comment about Dr. Neikirk.

15 And, finally, he had to say, look, I don't know the
16 element would be met. And if it's not met, yes, it would be
17 valid. But that's using Judge Schroeder's claim
18 construction. Using his analysis and the way he's applying
19 it, these patents are valid, yes, they are. And he went
20 through a thorough analysis, and it's his opinion.

21 That is the only way to interpret this testimony.
22 There is no way to interpret this testimony that there was a
23 current that was sufficient to begin start up in the prior
24 art.

25 Now, that's low level current. I am going to

1 address two more missing elements on this -- for this
2 motion.

3 The next one is secondary power source. Secondary
4 power source is an element that had the longest construction
5 of any of the elements. Among other things, it required
6 driving -- the identification of driving points for the
7 secondary power source and for a main power source.

8 So in order to establish that there was a secondary
9 power source, they would need testimony from an expert
10 identifying the secondary power source in the prior art and
11 explaining why -- where its driving points are and why those
12 driving points are physically separate from the driving
13 points of the main power source. Those are highly technical
14 issues. That is not something a lay person can figure out on
15 their own.

16 Without that testimony, again, an important part of
17 their obviousness case disappears, and we are entitled to
18 judgment as a matter of law.

19 What evidence did they put on that? None. Your
20 Honor, their expert Dr. Neikirk did not even mention driving
21 points. It doesn't show up anywhere in his testimony.
22 Moreover, he did not even make the conclusory assertion that
23 the secondary power source was found anywhere in the prior
24 art.

25 On direct examination I'm going to show Your Honor

1 his sole mention of the word "secondary power source." It's
2 when he was identifying what elements were found in Claim 6
3 that he would have to prove. He says: I started with
4 Claim 6. I tried to pull out the key pieces again so we can
5 look for those. There's a main power source, secondary power
6 source, low level current, sensing, and controlling.

7 The sole time he even used the words "secondary
8 power source" was when he said, this is what we have got to
9 show. This is what we need to prove. But then he never went
10 on to actually prove it.

11 The only time he discussed secondary power source
12 was on cross-examination when he admitted it was not present.
13 I put on the screen his testimony.

14 QUESTION: In your testimony you didn't identify
15 that the Fisher System teaches a secondary power source: Is
16 that true?

17 ANSWER: Not as construed by the Court, no, it does
18 not.

19 His only testimony, even conclusory testimony about
20 secondary power source was that it was not found in the prior
21 art he used.

22 Now, HP in their brief, they say, well, he did
23 mention it in a demonstrative, and they reproduce a
24 demonstrative in their brief. But they don't cite to the
25 record for that, and the reason is that demonstrative was not

1 in the record.

2 In fact, we cite Fifth Circuit and Eastern District
3 cases holding that demonstratives are never a part of the
4 record. Charts of this nature are not themselves evidence.
5 They are not evidence. You have to look at the testimony.

6 And, moreover, even that demonstrative itself, if
7 it had been admitted, would not have done anything because it
8 does not mention anything about driving points. It does not
9 apply the Court's construction.

10 So there was no evidence of secondary power source.
11 They needed testimony from an expert. Their expert didn't
12 apply it, did not supply that testimony. When asked on
13 cross-examination, he admitted it was not present.

14 The third missing element is main power source.
15 Now, for this element, Your Honor, the claim requires a
16 single power source, a single power supply that does two
17 things. It supplies power to the data node, power to the
18 switch, and also is for delivering a low level current from
19 said main power source.

20 So one power source does both things. Dr. Neikirk
21 never identified in the prior art a power source that did
22 both of these things.

23 In HP's brief they say the following: Again, they
24 point out the fact that Neikirk simply identified that there
25 was one piece of prior art that had a power source that would

1 do one thing, power the data node, and then a different piece
2 of prior art would power for the other function, but no power
3 source did nothing.

4 They say: For example, the Chang patents, the
5 Fisher System, and the Fisher patents disclosed a power
6 source supplying power to a data node. Well, that is true.
7 But that is not a main power source. You need a power source
8 that does both things. Supplying power to the data node is
9 not a main power source.

10 And then they say: And the Woodmas patent
11 disclosed delivering a low level current to the access
12 device. Well, the detection current from Woodmas was not a
13 low level current, as we just saw. Moreover, that current
14 was not provided from a power source that also provided power
15 to a data node, so it couldn't be a main power source.

16 Now, the reason they didn't have their expert
17 testify about it is because he had admitted in his own expert
18 report that it wasn't in the prior art. Here is -- from his
19 expert report. And for the combination of Fisher, Chang, and
20 Woodmas what he does is you can see here he refers to -- he
21 says: See the discussion and citations to Fisher in view of
22 Chang. So he just incorporates what he has done on Fisher
23 and Chang for main power source.

24 If we turn to that, here is what he says: Fisher
25 in view of Chang does not disclose this element of Claim 6,

1 main power source. In Fisher and Chang no power source
2 performs both of the functions; i.e., one, supplying power to
3 the data node. And, two, delivering a low level current to
4 the access device.

5 The reason they didn't ask Dr. Neikirk to testify
6 that there was a main power source in their combination is
7 because he found just the opposite. In his report he put a
8 footnote in admitting that it was not there.

9 All right. So they are missing three elements --
10 we also demonstrate in our brief that they are missing the
11 motivation to combine. That was simply conclusory. And the
12 Fisher System is not prior art. That eliminates on five
13 different bases their obviousness case.

14 Now, they say that the basis relating to missing
15 elements, that that was waived. That wasn't mentioned in our
16 JMOL. But they are simply not applying the correct law on
17 that, Your Honor. The correct law was set forth by the
18 Federal Circuit in the Orion case.

19 In that case the Federal Circuit, as they held in
20 that case, the Fifth Circuit construes Rule 50(a) liberally
21 such that adequacy of a motion depends on the context in
22 which the motion is made. And a cursory motion can be
23 sufficient if it is clear from the context that neither the
24 Court nor the non-movant's attorneys needed any more
25 enlightenment about the movant's positions on those issues

1 and that is exactly the case here.

2 Network-1 and the Court were well apprised of our
3 positions on these issues, and I am going to walk through the
4 evidence demonstrating that. And our evidence on this is
5 actually undisputed, Your Honor.

6 First of all, there is no dispute that we timely
7 moved for JMOL for lack of evidence of obviousness. We moved
8 that HP's entire validity case should be rejected as a matter
9 of law; that there is not sufficient evidence from which any
10 reasonable jury could conclude that the patent is obvious.
11 Moreover, we had unequivocally identified for HP the elements
12 that were missing from its prior art combination.

13 Dr. Knox, our expert, had identified those in his
14 expert report. He said expressly that the key missing
15 elements from Dr. Neikirk's proposed combination of Fisher,
16 Chang, and Woodmas included main power source, secondary
17 power source, and delivering a low level current.

18 And he explained in detail why they were missing,
19 the very things that happened at trial. He said, for
20 example, for secondary power source, Dr. Neikirk fails to
21 identify the claim secondary power source as defined by the
22 Court. Dr. Neikirk does not address the part of the Court's
23 definition that refers to driving points, doesn't identify
24 it.

25 Then, Your Honor, HP's own expert had admitted

1 before trial that these elements were missing. In his
2 report, for example, a quote from his report admitting that
3 the Woodmas current does not cause the start up. He admitted
4 in his deposition, and his deposition testimony was played in
5 front of the jury at trial, he admitted that Woodmas does not
6 disclose or teach a low level current.

7 He admitted that his prior art does not teach a
8 main power source that does both of the things required of
9 the main power source.

10 So HP was under -- there is no mystery about what
11 was missing. We pointed out, and HP's own expert admitted
12 it.

13 Then on cross-examination, Your Honor, we pointed
14 it out again. We had Dr. Neikirk admit that these elements
15 were missing. When we concluded with our cross-examination
16 of Dr. Neikirk, there could be no doubt that they understood
17 that a missing element was low level current, as Dr. Neikirk
18 had admitted that he hadn't found it. The same with
19 secondary power source in cross-examination, Dr. Neikirk had
20 admitted he didn't identify it.

21 In addition in the Orion case, they pointed out one
22 of the factors to consider, part of the context is that the
23 final jury instructions contain specific, detailed
24 instructions as to both anticipation and obviousness so that
25 the Defendant would know that they needed to -- that both

1 parties would know they needed to meet those elements.

2 Well, that was the case here as well, Your Honor.
3 There were detailed instructions on anticipation and
4 obviousness -- and I will go to our Slide 46 -- including
5 instructing the jury specifically that the details of the
6 Court's construction of secondary power source and low level
7 current would need to be met.

8 So HP was fully on notice that they would need to
9 present proof of those elements; that the jury would be told
10 that they needed to look for those elements.

11 Your Honor, just as you held in the Adaptix case,
12 in that case the oral JMOL on obviousness consisted of the
13 following: There's not specific evidence to determine
14 obviousness. That was seven words, yet Your Honor held that
15 was sufficient to preserve the issues. Why? In light of the
16 context. Because the other side knew that the invalidity
17 challenges were sufficiently developed, and the other side
18 was fully on notice of the issues concerning validity. There
19 is even more evidence of that here.

20 We put HP on notice before trial and throughout the
21 trial of the exact issues. There was no mystery when we
22 stood up and said insufficient evidence of obviousness is
23 what we were talking about. They knew exactly what we were
24 talking about.

25 The final factor on this waiver is this one, Your

1 Honor. As Your Honor held in Adaptix, in considering the
2 context we have to consider if greater specificity would have
3 resulted in reopening the case.

4 And in that case, Adaptix, the other side made no
5 claim in the briefing that it would have sought to reopen its
6 case to provide additional evidence for its invalidity
7 arguments had Adaptix been more specific in its oral motion.

8 The same is true here, Your Honor. There is no
9 claim by HP that if we had been more specific in our motion,
10 they would have then moved to reopen the case. And that is
11 for a very good reason, Your Honor. Their expert had
12 admitted, as we just showed, that they couldn't put on more
13 specific evidence on those elements.

14 He concluded in his expert report and in
15 depositions that they couldn't prove those elements; they
16 couldn't prove low level current, they couldn't prove main
17 power source, for example. As a result they simply couldn't
18 have put on more evidence, and they've made no claim in their
19 briefing that they could have.

20 And, finally, Your Honor, an additional factor here
21 is that Your Honor had given the parties an additional 25
22 minutes. HP, instead of using that time to try and put on a
23 better validity case, used it for other things, and they ran
24 out of time at the very end of the case even with that
25 additional 25 minutes.

1 So if they moved to reopen the case, not only would
2 they have not had any evidence they could have put on, they
3 didn't have time in which to put that evidence on.

4 Your Honor, there was no waiver here. We moved
5 before the jury verdict, before the jury went out to
6 deliberate for JMOL on obviousness because they had
7 insufficient evidence.

8 HP and the Court were fully aware of the issues.
9 All of the documents that I pointed to where HP was put on
10 notice about our contentions, were submitted to the Court.
11 They were in the Court record. There was no question about
12 it when we concluded our cross-examination, what elements
13 they were missing.

14 So for that reason there was no waiver. And with
15 no waiver, as a matter of law their obviousness case fails.

16 I will finish with one final thing, Your Honor.
17 This is certainly the most important motion I have ever
18 argued. All motions are important to clients, but this
19 motion is vital to Network-1. The '930 patent is an
20 important asset of Network-1. It is a public company.
21 Findings that these claims, especially these independent
22 claims are invalid, is very fundamental to Network-1. There
23 is nothing that is more important. I can assure Your Honor
24 that no matter which side loses this case, there is going to
25 be an appeal.

1 What I have wanted to point out here, Your Honor,
2 is that the reason you should rule our way is the Federal
3 Circuit law is crystal clear. You will be affirmed if you
4 grant JMOL our way. But if you don't, there is Federal
5 Circuit cases, four of them we have cited, where the Federal
6 Circuit reversed the district court that accepted evidence
7 like this. They don't have evidence that is sufficient to
8 withstand JMOL. Your Honor should grant our motion.

9 Unless there are any questions, I will stop here.

10 THE COURT: Thank you.

11 MR. DOVEL: Thank you.

12 THE COURT: Let's take a short recess.

13 (Recess was taken at this time.)

14 THE COURT: Please be seated.

15 Ms. Doan.

16 MS. DOAN: Your Honor, we obviously oppose the
17 Plaintiff's motion for JMOL on the invalidity issues. We had
18 prepared our comments, I think, for the entire motion with
19 respect to JMOL and for the motion for new trial. I am not
20 sure if Mr. Dovel is splitting up his argument for both. I
21 am happy to proceed with all of it or just a portion of it.
22 I just want to make sure I am responding to the right
23 thing.

24 MR. DOVEL: We are addressing those motions
25 separately, Your Honor.

1 MS. DOAN: Then we will stop at the end of that.

2 Your Honor, with respect to -- I would like to
3 start with Mr. Dovel's last comment with the plea to the
4 Court to please set aside the jury verdict in the Eastern
5 District of Texas because they will take care of this Court,
6 and they are going to take it up anyway.

7 We find that to be offensive, at least to the
8 Defendants. This is the first time that Network-1 has ever
9 tried this case. And what they are asking you to do -- to a
10 jury verdict. And what they are asking you to do is to set
11 aside the jury verdict in the Eastern District of Texas that
12 ruled for the Defendants based upon all of the evidence in
13 the record, not based upon the expert reports that Mr. Dovel
14 was reading from at the end, which are not in evidence in
15 front of the jury except for, I think, a few paragraphs that
16 he actually showed with respect to Dr. Davis. Those are the
17 only two.

18 But with respect to the verdict that was given,
19 Your Honor, there is several things that could have happened
20 here. They just didn't. And the jury went with the
21 Defendant.

22 For example, this is a general jury verdict.

23 I am so sorry, Your Honor. I have some technical
24 issues on this.

25 (Pause in proceedings.)

1 MS. DOAN: I will keep going, Your Honor, until
2 they get it clear.

3 With respect to the renewed motion for judgment as
4 a matter of law, the Fisher System was corroborated. There
5 is clear evidence of that. The Fisher System was also in
6 public use, and the standard that is set by the Fifth Circuit
7 is not -- there is lots of different types of public use, and
8 they are citing public use as in public demonstration. And
9 that is not what we are advocating here is for public
10 demonstration.

11 The second -- the third reason, Your Honor, is the
12 Plaintiff's estoppel arguments fail completely here because
13 they were not preserved in a 50(a) motion.

14 And, finally, Plaintiffs waived the remainder of
15 their arguments under the current Federal Circuit law of Shaw
16 and the HP cases. The jury -- the jury considered and
17 rejected secondary considerations and every element was
18 established.

19 Let's talk about first the renewed JMOL motion and
20 why it should fail under 50(b).

21 First, like I said a minute ago, this is a general
22 invalidity verdict. The Plaintiff could have asked for
23 specific interrogatory questions here. They did not propose
24 those. They have never asked those. This is a general
25 verdict, and it is based on obviousness. And all of the

1 evidence that came into this case showed by clear and
2 convincing evidence that each of these elements was made and
3 was met in the prior art, and the combination of the prior
4 art with respect to the Fisher System, Fisher patents, Chang
5 patents, and Woodmas.

6 And, as you know, the verdict must be affirmed
7 unless the evidence points so strongly or overwhelmingly in
8 favor of one party that the Court believes reasonable persons
9 could not reach a contradictory conclusion. That is just not
10 what is happening here.

11 Instead what is happening is that Network-1
12 believes that the evidence should be reweighed by this Court.
13 The evidence has been weighed by this jury. They have heard
14 all of the evidence here with respect to what Dr. Neikirk
15 said; with respect to Mr. Dovel's cross-examination of
16 Dr. Neikirk; with respect to Mr. Dovel's cross-examination of
17 Dr. Davis; and with respect to all of the evidence that we
18 put on with respect to Dr. Neikirk, Mr. Godici; and
19 importantly let's start with the very first day, the very
20 first witness, Corey Horowitz, the CEO of Network-1.

21 Corey Horowitz told this jury that he had already
22 said 15 years ago in 2003 that when he was talking to Merlot
23 that there is a risk that the detection scheme is an obvious
24 solution thereby rendering the '930 patent invalid. And we
25 went on to ask him a separate question making sure he was

1 talking about the '930 patent. And he said: Probably yes.

2 Not only was that his testimony, we also introduced
3 a document, DX27, where he is specifically talking about all
4 of the problems with the '930 patent. And one of the large
5 bullets, No. 3, with respect to Mr. Horowitz's memorandum and
6 statements that came before this jury the very first day,
7 prior art and obviousness are still issues that might affect
8 validity. There are several proprietary solutions
9 pre-802.3af, and their impact is unclear.

10 And as this Court will recall, we discussed
11 different propriety solutions with respect to the proposals
12 that were presented to the IEEE and Dave Dwelley's testimony,
13 et cetera.

14 Then Mr. Horowitz went on to say: Moreover, there
15 is a risk that the detection scheme is an obvious solution
16 thereby rendering the patent invalid.

17 Mr. Horowitz and Network-1 knew 15 years ago that
18 the '930 patent may be held to be invalid, and there was
19 clearly a risk with respect to that. They had given lots of
20 licenses to various people. I think they introduced 24 or 26
21 in front of the jury. They had written, as the Court will
22 recall, over 350 letters asking for different companies to
23 license. And, of course, not everybody licensed, as we
24 talked about, with respect to -- Apple comes to mind. There
25 were several others that did not license as well.

1 But they introduced -- this isn't a case where they
2 were -- somehow withheld these various licenses from coming
3 in front of the jury. He introduced these licenses the very
4 first day, and Mr. Dovel opened on it telling the jury
5 that -- signaling to the jury that everybody else has
6 licensed this; therefore, this patent is valid.

7 But that is not the law. And it never has been the
8 law. And he has known for 15 years that if he ever was
9 pushed actually to trial that there is prior art out there
10 that may render this invalid and obvious.

11 Next slide, please.

12 Let's talk about the corroboration, the points that
13 Mr. Dovel raised. First of all, with respect to the Fisher
14 System, it is definitely corroborated.

15 Next slide, please.

16 As the Court knows, the Federal Circuit law is that
17 physical, documentary, or circumstantial evidence or reliable
18 testimony from individuals other than the alleged inventor or
19 an interested party, may corroborate. And this is not what
20 Mr. Dovel was saying, that somehow 3Com is using the
21 invention of Mr. Kasowitz [sic] and Deptula.

22 The Fisher System was definitely corroborated. We
23 don't just have Mr. Fisher giving testimony up there by
24 himself. He actually brings the second generation product
25 from 1996. And goes through it and shows it with the jury.

1 As the Court will recall, we then gave it to the jury to show
2 certain parts. Then again the Fisher System was corroborated
3 through Dean Neikirk's testimony, and, again, he showed how
4 the Fisher System worked. And, again, different parts were
5 shown to the jury. So the Fisher System is corroborated not
6 only through Mr. Fisher's testimony but also this system
7 itself.

8 Here we have Mr. Fisher also showing there is a
9 specific date on the second generation, and it is copyright
10 1996. Now, what Mr. Dovel wants to say is that, yes, but you
11 didn't show me the additional evidence where it is actually
12 registered with the Copyright Office. That is not required.
13 What is required is some evidence. It has got to be clear
14 and convincing evidence, but there is always more evidence.

15 We could have shown that. We could have presented
16 evidence from someone else that used it. We could have done
17 this to show additional evidence. But that is not required,
18 not to set aside the jury verdict. Some evidence that
19 supports that. And there is clear and convincing evidence
20 that the jury had in front of it.

21 And we -- and Mr. Fisher also talked about the
22 specific Fisher patents, as the Court will recall there were
23 three Fisher patents and a European patent on the system
24 itself.

25 So this is not the type of case where he is talking

1 about -- and I believe he used the Finnigan case saying
2 that -- yes, the Finnigan where we had to show there was
3 something else going on besides the inventor testimony.

4 And if the Court will recall in Finnigan and in
5 Rosco we clearly distinguished those cases, those are two
6 cases where anticipation is the invalidity theory there, not
7 obviousness. So it is one prior art reference, not multiple
8 prior art references. And there is only the inventor that is
9 testimony -- that is testifying.

10 He has no product with him in Finnigan and Rosco.
11 He has no drawings. He has no other patents. Here you have
12 all of these things. This is clearly corroborated.

13 Next slide, please.

14 And Dean Neikirk, Dr. Neikirk also answered the
15 question, and the question was: And has it -- referring to
16 the Fisher System -- been corroborated here that it was in
17 public use?

18 Exactly the testimony that Mr. Dovel said that we
19 did not have in the record. It is clearly in the record.
20 Corroboration in public use. And Dean Neikirk said: Yes.
21 Dr. Fisher told us this morning they had built a system, they
22 had plugged it into the network in their offices, and used
23 it.

24 Dr. Neikirk also goes on in his trial testimony and
25 talks about this phone call that he had with Dean Neikirk --

1 with Mr. Fisher -- Dr. Neikirk and Mr. Fisher, and talked
2 about specifically that he told him it was in public use,
3 what was going on at the time, and how he developed it, et
4 cetera. The jury heard all of that testimony. Not just from
5 Mr. Fisher and his testimony but also from the phone call
6 from Dean Neikirk. It wasn't like he just sat there and
7 listened to it and was able to opine on it further.

8 So we have of the Fisher System corroborated, and
9 we actually put it into the combination of the Fisher, Chang,
10 Woodmas combination. And Dean Neikirk specifically talked
11 through how the Fisher System and what it did with respect to
12 the combination, and he went through all four of the parts
13 that were shown when it was corroborated; being the access
14 point, main power source -- sorry, Your Honor.

15 There were four elements that were shown with
16 respect to the Fisher System, and I -- my mind just went
17 blank. I'm so sorry. It's the access point, main power
18 source, a data node, and the data signaling pair all were
19 shown with the Fisher System. And we went over that in
20 painstaking detail in the trial testimony of Dr. Neikirk.

21 Next slide, please.

22 So what we have on the corroboration is not only
23 the actual hardware of the system itself. We have pictures
24 of the system as well that are labeled by Mr. Fisher. We
25 have Mr. Fisher's testimony where he is actually holding the

1 system and showing how it matched up with the patents and
2 what it specifically did. We also have Dean Neikirk taking
3 the system, going through it and showing how each of these
4 elements -- four elements were met with respect to the eight
5 elements that had to be met on the '930 patent, Claim 6.

6 And then we also have the patents themselves. He
7 showed evidence where each of these four elements is met in
8 the patents themselves. So the Fisher System is clearly
9 corroborated under the current Federal Circuit law.

10 Now, what else did he say with respect to
11 corroboration? That's all he said. Corroboration of public
12 use, he cites Finnigan and Rosco. But Finnigan and Rosco are
13 clearly inapposite for the reason that we discussed before.

14 And what was the jury instructed on? You
15 specifically instructed the jury not on just, hey, as long as
16 Mr. Fisher says it, it is good enough. But, no, documentary
17 or other physical evidence that is made contemporaneously
18 with the inventive process is the most reliable proof that
19 the testimony has been corroborated. That was in their final
20 jury instructions.

21 Here we not only had the inventor testimony, we
22 also had documentary testimony, drawings, and patents that
23 supported it, and we also had the actual system itself of
24 which 58 pictures now exist for DX500, Your Honor.

25 There is no doubt that the evidence is

1 overwhelming. It doesn't have to be overwhelming. But it
2 was corroborated.

3 The Fisher System was also public. And let's talk
4 about this public testimony, public use testimony and what
5 evidence there is and what the actual case law is in the
6 Federal Circuit because it is not what Mr. Dovel says it is.

7 Public use. Whether a public use has occurred is a
8 mixed question of law and fact. And under Barry vs.
9 Medtronic, the inquiry is characterized: A mixed question of
10 law and fact given to the jury without a special verdict --
11 which the Plaintiff did not request here -- without a special
12 verdict form delineating the questions of fact, the jury's
13 conclusion must be upheld unless the jury was not presented
14 with substantial evidence to support any set of implicit
15 findings sufficient under the law to arrive at its
16 conclusion.

17 Here they did not ask for special
18 interrogatories. It is a general jury form. And they found
19 that, indeed, this element is met.

20 Go to the next slide, please.

21 There is testimony of public use. Dr. Neikirk
22 said, as we have discussed before: Dr. Neikirk,
23 was Mr. Fisher's system, was it in public use?

24 Yes, I believe it was.

25 What is this belief based upon?

1 His conversations, his testimony, and what he has
2 seen with respect to the product itself with the specific
3 date on the product.

4 The Fisher System was in public use, as we know, on
5 the silk screen and also on the radio, all rights reserved,
6 copyright 1996 with respect to 3Com.

7 Next slide, please.

8 Public use includes any use of a claimed invention
9 by a person other than the inventor who is under no
10 limitation, restriction, or obligation of secrecy to the
11 inventor.

12 And I want to stop here because Mr. Dovel put up
13 some words on the side that is supposedly what Mr. Fisher was
14 saying. He said it was only used in testing. It was only in
15 research and development. It was only experimental. It was
16 only internal development.

17 And when you read through the record and what
18 Mr. Fisher said, that is not what he said about the second
19 generation 1996 system that he actually brought to the
20 courtroom to put in front of the jury.

21 So I took down what Mr. Dovel said, and I looked
22 back at these references that he was referring the Court to
23 because I noticed they would be in quotes, quote, research
24 and development as those these were words used by Dr.
25 Neikirk -- by Mr. Fisher, but in what context?

1 So we look at -- and I am on the transcript from
2 November 10, 2017 in the morning, and I am on Page 123. And
3 the question was -- it is on background with respect to
4 Mr. Fisher: In general what were your roles and
5 responsibilities while you were employed at 3Com?

6 And he says: I was responsible for developing the
7 wireless networking technology. I managed the engineering
8 group. I was the guy that worried about the system problems,
9 you know, was the -- kind of the key architect on a lot of
10 things and managed the engineers' day-to-day activity.

11 And then the question was, by Ms. Cho: Did you
12 ever do any research or development in the Power over
13 Ethernet field? That is where the quote research and
14 development comes from that they are saying is the limitation
15 that this 1996, Exhibit No. 500 was limited to at 3Com.

16 Did you ever do any research and development?

17 And he says: Yes, we did. I, myself, and Larry
18 were kind of the key inventors of it.

19 That does not mean nor does it say it was only used
20 for research and development.

21 So I looked next at the next reference he had,
22 which was Page 131 of the same day, November 10th, 2017, in
23 the morning.

24 And the question is: So the system you have just
25 shown us, is it okay if I call this the Fisher System? And

1 this was Mr. Thane asking questions about this.

2 And he says: Yeah, sure, you can call it the
3 Fisher System. It was the first Power over Ethernet. And I
4 was thinking if I were really bold, I would get out the
5 charger and the Ethernet and fire it up, which we could
6 probably do.

7 And he is talking during the deposition like we
8 could probably do it right here.

9 And then he goes on to say in the next -- second to
10 next paragraph: So in order to test it, you know, we would
11 just plug that in, stick it in the front of the hub, and then
12 take the 10BaseT wiring that was in the building and plug it
13 in here so --

14 And the question is: Did you actually
15 implement...

16 And then it went on to the next questions.

17 But he is talking about we could test it right here
18 in this room in this deposition. He never says we only used
19 it for testing. The snippets and quotes Mr. Dovel is using
20 are taken completely out of context.

21 And then, finally, there is another one where he is
22 talking about where he actually -- let me get the phrase on
23 this last one. I'm sorry, Your Honor. Internal development
24 and what they had done. And so the question -- and
25 proposals.

1 And then so the question is on Page 137, now
2 Line 8: Sometimes when we have been talking about the system
3 you have talked about proposals versus the system. Are there
4 two different things, or was the whole thing a proposal or
5 something else?

6 Mr. Fisher says: So we -- so we had built. So it
7 is a good question. The first hardware that we built that I
8 brought with me we had not yet put it in a switch. Then he
9 goes on to talk about the first hardware.

10 And then he also says: When I use the word
11 "proposal" there was hardware that was in development that,
12 you know, we were working on it with respect to the first
13 proposal. But the second proposal, what he has then, was
14 what was in use at 3Com that was being used with everyone out
15 in their system that they had plugged in in the ceiling at
16 3Com to get wireless access information to be used with
17 everyone including the public. That was the second system.
18 That's the 1996 one.

19 So Mr. Dovel's comment that he says, oh, yes, it
20 couldn't have been that first one from 1995 because then they
21 would be in violation of the on sale bar because their patent
22 application wasn't until 1997. Yes. Well, the one we talked
23 about that was introduced in front of the jury was the 1996.
24 It is copyright 1996. There no question here, they are not
25 in violation of the on sale bar.

1 But what else does he say? He says -- what
2 Mr. Fisher says on Page 138 of his deposition testimony when
3 he was questioned by Ms. Cho, she asked him a question: But
4 was this concealed?

5 And he says: I don't know anything about it being
6 concealed from the public.

7 So there is -- the only testimony with respect to
8 concealment was Ms. Cho's question Network-1 was trying to
9 get him to admit that somehow it was secret, confidential,
10 concealed from the public, and he specifically denies it. I
11 don't know anything about that. He never said it was
12 confidential. He never said there was an NDA. He never said
13 anything about that.

14 There is just absolutely no testimony on that,
15 which is the testimony that was found in the Dey case, the
16 case that Mr. Dovel says is so similar to this case, Dey
17 specifically -- the inventor said it was unavailable to the
18 public and it was confidential. That is not at all what
19 Mr. Fisher said. That is not what he said in the testimony
20 from this jury. It is not what he said on the phone call
21 with Mr. Neikirk -- Dr. Neikirk that he testified about, and
22 it is just not anywhere shown in the record.

23 It was used at 3Com with others, a wireless access
24 device with respect to communications.

25 So the JumpSport case has not been overruled by the

1 Dey case. The Dey case specifically said it had to be
2 confidential and used with the public. That is not what
3 JumpSport stands for.

4 The Plaintiff wants us to think it is a public
5 demonstration; that somehow we had to go out and demonstrate
6 it to the public. We are not saying that we had a some kind
7 of -- we presented it at the IEEE. He didn't know anything
8 about that. He was asked about that. He just didn't have
9 any testimony about that. He is not saying that someone else
10 had to see it.

11 But if there is a public demonstration, as this
12 Court knows, as this Court has tried other invalidity cases,
13 there is no requirement that you have to have someone there
14 that has seen it.

15 Now, the evidence is stronger for the defense if
16 someone has seen it. So, of course, we are always trying to
17 look for the strongest evidence possible, but there is no
18 evidence of that.

19 And, in fact, the law is more akin to the Voter
20 case that we cite in our surreply brief, Voter Verified vs.
21 Premier Election Solutions. As this Court knows, to make it
22 publicly available, for example, all you have to do is put it
23 on the Internet. And in Voter Verified the issue was, well,
24 it may be on the Internet, but a search engine can't find it.

25 And the Federal Circuit said: Where the Court

1 found a prior art reference was sufficiently accessible to
2 the public when it was posted online, regardless of whether
3 it could be found using a search engine. The standard for
4 public use is nowhere near as high as what Mr. Dovel is
5 saying.

6 Now, if we were in front -- if we were arguing that
7 we had lost this issue and we had presented -- we might not
8 be able to have all of the evidence we could have but we had
9 sufficient evidence to make it clear and convincing for this
10 jury with respect to the public use, and that is all that is
11 required under the case law lest because they did not have a
12 specific verdict form on this.

13 If they had and had listed, okay, was it
14 corroborated? Okay. Was it used in the public? Okay. Were
15 these specific questions asked? That would be different.
16 The Plaintiff wanted a general verdict form, and that was
17 fine with us. So we went with that.

18 I think I have addressed everything he asked -- he
19 said on public use, but if there are any questions the Court
20 has, I am happy to cover this as well.

21 All right. Let's go to the next slide, please.

22 Oh, public use also came in from Dr. Davis because
23 Dr. Davis talked about 3Com and HP had functional systems for
24 delivering Power over Ethernet to wireless access points, and
25 he was talking about the state of the art, but he was clearly

1 talking about what was happening back then with respect to
2 3Com.

3 And the next slide.

4 So Dr. Davis says, the question is: Now, you told
5 us something about the background of the technology of the
6 patent and various systems and you talked about the Fisher
7 System?

8 And he says: I did.

9 And the question is: In your report -- in your
10 report you mentioned from Page 43 to 44 -- and this
11 questioning from Mr. Dovel -- you say, I discussed with
12 Mr. Fisher the work that led to the 3Com Power over Ethernet
13 patents on September 19th, 2016. And during the call
14 Mr. Fisher System explained, and so on; is that correct?

15 Then he says: What you have up there is correct.

16 And then Mr. Dovel has specifically put in front of
17 the jury Pages 43 and 44 of Dr. Davis's report. Here are
18 Pages 43 and 44 of Dr. Davis's report.

19 And these actually say: For example, 3Com -- now
20 HP -- had functional systems for delivering Power over
21 Ethernet to wireless access points and VoIP phones that were
22 effective and safe to operate.

23 He also says in report that was in front of the
24 jury: It is my opinion that 3Com/HP created the foundation
25 for Power over Ethernet systems including before and after

1 the development of the 802.3af standard.

2 Mr. Dovel put those pages in front of the jury.

3 Next slide, please.

4 And, of course, there were two things. I think
5 that the argument that Mr. Jacobson actually made with
6 respect to the 50(a) motions, Your Honor, is very limited.
7 It is not broad like Mr. Dovel is saying.

8 But at the end when he specifically argued with
9 respect to public use and corroboration then and Ms. Bennett
10 responded, you responded: Thank you, Mr. Jacobson. I think
11 there is a legally sufficient evidentiary basis on all of
12 these issues for a jury to find in the Defendant's favor.

13 That was your ruling on 50(a). It is still your --
14 should be -- we -- request -- it still be your ruling today.
15 There is still evidence in the record to support both public
16 use and corroboration under the Federal Circuit law.

17 Now, next we talk about HP not being estopped. So
18 this is actually another issue that was preserved by 50(a).
19 There is a lot of them that were not preserved by 50(a), but
20 this one was preserved by 50(a).

21 But it is interesting because Mr. Dovel, who is up
22 here in front of you telling you this issue was going up
23 anyway, but the Federal Circuit law supported his position,
24 the Shaw and the HP cases, the two current 2016 Federal
25 Circuit cases in the area of estoppel actually support

1 Hewlett-Packard in this case.

2 Next slide, please.

3 The issue here is Section 315(e) where they create
4 arguments for estoppel. They are on any ground that the
5 petitioner raised or reasonably could have raised during the
6 inter partes review.

7 So, of course, the Plaintiff's argument is it looks
8 like they should win on corroboration and public use, and
9 therefore, we can't proceed on the patents. That is not the
10 law in the Federal Circuit.

11 Fisher, Chang, and Woodmas patents, actually not
12 all of them that are in this case but a subset of them, were
13 put before -- a request with an inter partes review with the
14 PTO which was not instituted. Under Shaw and under the HP
15 cases the current case law in the Federal Circuit is
16 non-instituted references from an IPR are not barred.

17 And there is no Federal Circuit case law that says
18 what Mr. Dovel is advocating here that because HP joined an
19 already instituted IPR of Avaya -- if the IPR is already
20 instituted, we cannot introduce new prior art into that IPR.
21 Because we joined Avaya's IPR, there is no Federal Circuit
22 law that says that we are somehow barred by bringing a
23 Fisher, Chang, Woodmas patents only before this jury.

24 We didn't. We think the Fisher System is
25 overwhelmingly with respect to the four elements that we are

1 talking about with the Fisher System. We think that there is
2 overwhelming evidence that it was corroborated and it was in
3 public use, so we don't really have to reach this issue.

4 But if the Court does reach this issue, the Federal
5 Circuit law favors HP. That is what the HP case stands for
6 and also Shaw. It is also telling that Mr. Dovel did not
7 address this. It is in both our response brief and our
8 surreply brief, and he did not touch on it at all when he
9 started talking about estoppel.

10 Next slide.

11 With respect to waiving all of the other arguments,
12 as this Court knows if a party fails to move for judgment as
13 a matter of law under 50(a) of the Federal Rules of Civil
14 Procedure on an issue at the conclusion of the evidence, that
15 party waives both its right to file a renewed post-verdict
16 50(b) motion and also its right to challenge the sufficiency
17 of the evidence on that right to appeal.

18 So their arguments with respect to low level
19 current, secondary considerations, secondary power source and
20 main power source, those are all waived.

21 In particular, in the transcript from 11-10-17,
22 Mr. Jacobson makes his argument with respect to JMOL on 50(a)
23 at the very bottom of Page 157. And it goes two-thirds
24 through the Page 181. He does preserve public use. He does
25 preserve corroboration. He does preserve what he calls his

1 estoppel argument that we have already addressed.

2 And then he goes in to talk about the issue with
3 respect to the claim construction, the combination doesn't
4 render the patent obvious, and then there is also this issue
5 with respect to the breach of contract case that we raised
6 that -- where the matter of law should have been in New York,
7 et cetera, and then that was withdrawn.

8 Those are the only thing he raises. He doesn't say
9 anything specifically about main power source, secondary
10 power source, secondary considerations, et cetera.

11 And why is this important? It is important because
12 not only does the Federal Circuit case that we just read
13 support saying that you have to raise it on 50(a) to raise it
14 on 50(b), but also the Decorte case versus Jordan says: We
15 caution that the 50(a) motion should be far more specific
16 than a bare bones recitation of insufficient evidence as
17 required by 50(a)(2).

18 And as this Court knows the i4i/Microsoft case came
19 out of this jurisdiction. And they specifically raised this
20 issue when it said, this may be an interesting issue for
21 appeal, but it is not preserved on 50(a). It was not
22 specifically mentioned, and Microsoft could not raise that
23 point on 50(b).

24 So it is not just the Federal Circuit that has
25 spoken so strongly on this but the United States Supreme

1 Court has, as well. They had every opportunity, as this
2 Court invited, if they wanted to file something that night to
3 delineate every -- or they wanted to move on, they failed to
4 do that. These additional points are waived. But there is
5 sufficient evidence on all of these additional points, so we
6 are happy to address those as well.

7 With respect to secondary considerations, and we
8 want to start there because the secondary considerations
9 point is a fairly a large point here.

10 Oh, before I go to secondary considerations,
11 another point that Mr. Dovel raised in his argument on waiver
12 he talked about the Blackboard case and the Orion case, which
13 are other earlier Federal Circuit cases, but there has been
14 additional Federal Circuit cases that we are talking about
15 here, as well as the Supreme Court case.

16 But then he started reading from the Knox rebuttal
17 report how we should have been on notice of certain things.
18 That is not proper. Just having it, putting something in a
19 rebuttal report of an expert does not give us notice at the
20 end of trial that they are going to stand up and say, hey,
21 there is no evidence of secondary considerations or somehow
22 that has been left out when clearly that was discussed.

23 But, I mean, that was something that you cannot do
24 is preserve it by putting it in some type of expert report.

25 They also cite to Neikirk's expert report as well.

1 If they think there is missing evidence about something, we
2 failed to address it specifically to their liking with the
3 wording specifically like they like it, that was the time to
4 preserve it, and they failed to do so.

5 And, Your Honor, what they are asking you to do is
6 basically say that if it is -- it is not waived because we
7 could always put it in our expert reports, then that will
8 really be a problem with 50(a) and 50(b) motions in the
9 future. If all we have to do -- and the Plaintiff and
10 Defendants will do this in the future, if all we have to do
11 in this Court to be able to preserve a 50(a) motion is to
12 include it in some expert report and to have sent it at some
13 point during this trial to the other side and that will
14 suffice for 50(a), that is not the law. That is what they
15 are advocating for this Court to do, and this Court should
16 not hold that to be the law.

17 All right. So we talked about secondary
18 considerations.

19 Next slide, please.

20 As this Court recalls, this is not a case where
21 secondary considerations didn't come into evidence. All of
22 these licenses came into evidence. They came into
23 evidence -- this is a slide from the Plaintiff's opening
24 slide deck. They opened on this because they wanted the
25 jury, our theory is, to advocate during their job.

1 But the jury heard about these licenses from the
2 get-go, and they analyzed each of these licenses, and they
3 looked at them.

4 And what did these licenses show?

5 The next slide.

6 For example, when we talked about these licenses,
7 we showed the jury through Corey Horowitz, the first witness
8 on the very first day, we said let's look at the Cisco
9 license. There is no admission in the Cisco license that
10 there either constituted an admission of Cisco or its
11 affiliates or Cisco's authorized parties of liability,
12 infringement or validity of the asserted patent. That's what
13 these licenses are. It was just not to have to try the case.

14 The jury heard of all of -- this is not a case
15 where the jury did not hear this evidence. They heard all of
16 this evidence. Then we also showed where the vast majority
17 of the other licenses have -- there is 12 of them that we
18 went through specifically. We didn't got through all 26 of
19 them. We could have. But they are all very similar.
20 Language saying they did not admit to liability. They just
21 wanted to settle the case. And they also showed that they
22 settled for fairly low amounts.

23 I mean, there are various amounts that were out
24 there; and depending on -- obviously, money is relative --
25 but for not anything near the 80 to \$100 million they were

1 asking from HP in this case. So the jury did hear the
2 evidence of secondary considerations.

3 They were able to analyze exactly what that
4 evidence was and what it was trying to be used for, and they
5 rejected Plaintiff's thoughts with respect to secondary
6 considerations.

7 And as the case law in the Federal Circuit says,
8 under Rothman: This Court must presume that the jury
9 adequately weighed this factual evidence and found it
10 insufficient to support a finding of validity. Indeed, a
11 strong prima facie obviousness showing may stand even in the
12 face of considerable evidence of secondary considerations.

13 We have that here. We heard all of it, they
14 analyzed it, and they still ruled for the Defendant based
15 upon what those licenses really were.

16 Next slide, please.

17 And then HP also proved every element that was in
18 the prior art, and we are going through these -- these are
19 the ones we say are waived now. I am happy to go through and
20 we think there was plenty of evidence of all of them.

21 With respect to low level current, Dr. Neikirk --
22 and you will recall, Your Honor, that this was where
23 Dr. Neikirk was showing the low level current in Woodmas, and
24 he specifically went through the Woodmas -- as was -- as the
25 Court's claim construction, Woodmas would need to be combined

1 with the other references Chang and Fisher. And I marked
2 specifically where he covered this in his transcript.

3 Okay. I will have to come -- it is on -- and it is
4 the afternoon of 11-10-17. And he specifically talks about
5 Woodmas and the low level current, and on Pages 32 all the
6 way through 36 talking about the various combination where
7 the low level current is shown under the Court's claim
8 construction.

9 But more importantly, standing on its own with
10 respect to low level current, he did apply Dr. Knox's
11 interpretation of this Court's claim construction. He did.
12 Because as this Court will recall, in the Realtime Data case
13 this Court is on, if an infringement expert is going to use
14 one interpretation, it is totally fair game for the
15 invalidity expert to use that exact same interpretation.
16 Otherwise, they are holding us to a standard that they
17 themselves don't even meet.

18 But let's talk about low level current and what he
19 said. The question was: Is there any doubt in the your mind
20 that with respect to the Court's claim construction of low
21 level current and the combination we put before this jury,
22 that the combination does indeed show a low level current?

23 And Dr. Neikirk says: No, there is absolutely no
24 doubt in my mind whatsoever.

25 What else does Dr. Neikirk says? He says: By

1 delivering this 50 milliamp current before full operating
2 power is supplied and in looking for return voltage
3 representative of the full low level current, both the
4 presence and functionality of power delivery unit 76 are
5 checked before full power is imposed on the cable 30
6 [Referring to Figure 1 in Woodmas]. Do you see that?

7 He says: I do.

8 And here we talk about the low level current, low
9 level power that is met here with respect to Woodmas. We are
10 showing it here in No. 6. That is the slide he had in front
11 of him when he was talking the testimony that was in the
12 record --

13 Go back to 39, if you don't mind, Josh.

14 -- when he is giving this testimony with respect to
15 this Q and A how and how it would work with respect to the
16 Woodmas low level current.

17 And then 40, please.

18 And he testified specifically that low level
19 current and sensing were both met by Woodmas.

20 So what else does Dr. Neikirk says? The question
21 was: And that would be applying Judge Schroeder's claim
22 construction of beginning to start the access device but
23 insufficient to sustain start up, as Dr. Knox, the
24 Plaintiff's expert is applying it, right?

25 He says: Yes, that's correct.

1 Using his analysis and the way he's applying it,
2 these patents are invalid.

3 And he says: Yes, they are.

4 Next slide.

5 And Dr. Neikirk goes on to say he applies the
6 Court's construction -- is clearly teaching us a great deal
7 about low level currents.

8 The question was: Sir, in your opinion, does
9 Woodmas disclose or teach a low level current using the
10 Court's definition?

11 And he says: Applying the Court's definition as
12 the Plaintiff has, then, yes, it is present. And the law in
13 this jurisdiction is that -- under Realtime Data, is that
14 that is the way to interpret this.

15 Go to the next slide, please.

16 Oh, I'm sorry. He also says: I'll go ahead and
17 check off low level current again, and pointing out that we
18 will see that it's truly the low level current as construed
19 by the Court when we look at the combination.

20 And those are the pages of the record that I just
21 referred Your Honor, when we are talking about the
22 combination that he went through showing, using this Court's
23 claim construction how low level current is met by Woodmas
24 when it is used with respect to the Fisher and Chang patents
25 as well.

1 And this Court in Realtime data had that: Such an
2 approach allows a defendant to set forth relevant,
3 alternative invalidity arguments for the jury to consider in
4 the event that it ultimately finds for -- the Plaintiff's
5 interpretation of the claims is correct.

6 So not only did he use this Court's claim
7 construction when he was doing the entire combination, but he
8 also used the Plaintiff's interpretation, as well, to show
9 that that indeed was -- you are looking at Woodmas by itself.
10 It did show a low level current.

11 And this Court in addressing the Koito and
12 Fresenius case must present some evidence to show that -- a
13 jury that the prior art reference discloses an element of the
14 asserted claim. The "some evidence" here is Woodmas.

15 It is important, Your Honor, because even Dr. Knox
16 acknowledges through sworn testimony that Woodmas shows a low
17 level current. I mean, there is no doubt that Woodmas shows
18 a low level current. And when I look at what he said
19 specifically, Dr. Knox testified under the questioning of
20 Mark Ferguson that it is: Current merely used in detection
21 process.

22 That was Dr. Knox's interpretation of your claim
23 construction. That's what Dr. Neikirk also used in his
24 interpretation in saying, look, if that is what Dr. Knox is
25 going to use to show infringement, then I will go through

1 that analysis as well and show it with respect to invalidity.

2 The jury heard all of this. The jury heard what
3 Mr. Dovel -- the questioning he gave to Dr. Neikirk on
4 cross-examination because he took him through different
5 hypotheticals and what about this? Well, what if you use
6 this definition?

7 And remember that Dr. -- Mr. Dovel said something
8 like, well, you don't agree with Dr. Knox so, therefore,
9 Dr. Knox is erroneous, so we are using the erroneous claim
10 construction, and you find low level current. And then
11 trying to say, but the correct construction you don't find
12 low level current. And the jury heard all of that.

13 And the jury still saw through all of that and
14 said -- and we were talking in front of the jury and said, it
15 is the goose/gander rule. If you are going to use -- Dr.
16 Knox is going to have one interpretation of Dr. -- of Judge
17 Schroeder's claim construction, then we are entitled to use
18 that on invalidity as well because that is the law in the
19 circuit and that is the law -- in the Federal Circuit -- in
20 this division, and that is the law in the Federal Circuit as
21 well with respect to Realtime Data.

22 He heard everything with respect to
23 cross-examination and still the jury found for the Defendant
24 because they saw what Mr. Dovel was trying to pigeon-hole him
25 to say, and they disagreed with what he is saying. The jury

1 heard that he found low level current in combination, and he
2 also found it in Woodmas alone when he was using Dr. Knox's
3 interpretation of this Court's claim construction.

4 And then at the end of Mr. Dovel's argument, he
5 puts up my closing argument as evidence somehow of no low
6 level current. But that's obviously, as the Court knows --
7 and the arguments of Counsel are not evidence. It is
8 interesting that Mr. Dovel would put up my argument that it
9 would be evidence of no low level current.

10 But as you know, we did cover this in front of the
11 jury about all aspects of Dr. Neikirk's testimony because I
12 wanted the jury to see everything just like we want this
13 Court to see everything, and just like we want -- there is
14 evidence to support the invalidity verdict here.

15 Now, if we could go to the next slide.

16 With respect to secondary power source, let's look
17 at that. Dr. Neikirk -- the Chang patents, which is where
18 the secondary power source came in with respect to the
19 combination, teaches the data node and the network interface
20 adaptor, the access device, and how they provide electrical
21 power from the hub, the data node, to the remote adaptor, to
22 the access device using the network's wiring.

23 Mr. Dovel was critical that we did not specifically
24 talk about -- and here is the actual demographic --
25 demonstrative that was in front of the jury while Mr. --

1 Dr. Neikirk was giving his testimony that we just went over
2 specifically talking about secondary power source.

3 But it is interesting because he said, well, you
4 didn't go into the definition of driving points, et cetera.
5 We have, with respect to the secondary power source and the
6 main power source, we have different driving points with this
7 Court's claim construction. And not that you had to have two
8 different driving points from the secondary power source.
9 And in this combination for obviousness, the power sources
10 come from two different patents, so clearly they have two
11 different driving points.

12 That was an issue that could easily have been
13 cross-examined on. It is an issue that is very obvious since
14 it is not one power source having two different driving
15 points. It is one patent, the Chang patent providing a power
16 source with a driving point, and then the Woodmas patent
17 providing a power source with the driving point, so they are
18 clearly two different things. That is a red herring.

19 But the Chang patent does teach the secondary power
20 source, and this demonstrative was also in front of the jury
21 where he went through and showed Fisher plus Chang teach
22 everything except for low level current, and that needed to
23 be added by Woodmas.

24 I believe I have covered everything on secondary
25 power source. Now let's go to the next one. Main power

1 source.

2 The issue here is not whether main power source or
3 not I believe -- because clearly Fisher teaches main power
4 source, and that was definitely covered with respect to the
5 evidence in the case.

6 I believe the issue here is, again, that we did not
7 show that main power source was delivering a low level
8 current and also sending power to the data node, the
9 access -- the data node. I believe that is the issue that we
10 have here. And that was taught here with respect to the
11 combination.

12 So we have the Fisher, Chang, and Woodmas
13 combination, and then we have the Chang -- in the lower
14 left-hand corner here and on Slide 51, the lower left-hand
15 corner shows the Chang actual power source, and then we have
16 on the 51, the right-hand corner we have the Woodmas power
17 source, the power receptor unit.

18 And so those in combination --

19 Go to the next slide.

20 Those in combination show one power source actually
21 covering, delivering the low level current and sending power
22 to the -- connected to the supply power to the data node and
23 delivering the low level current.

24 And, as you will recall, we talked for pages about
25 motivation to combine and whether there was evidence of

1 motivation to combine. That is replete throughout
2 Dr. Neikirk's testimony. Then we specifically covered, is
3 this what experts in the field do is to look at these
4 different patents and combine them? And he said, yes, this
5 is exactly what they would do.

6 And there was no cross-examination on that point
7 whatsoever, so to say that he did not combine them now or did
8 not have evidence of a main power source doing A and B, that
9 is just not credible since the testimony is that he did.

10 When the jury was supplied with sufficient, valid
11 factual information to support the verdict it reaches, that
12 is the end of the matter. In such an instance the jury's
13 factual conclusion may not be set aside by a JMOL
14 order. Here the facts are not only that they had
15 corroborating public use -- arguments with respect to the
16 Fisher System. And the Fisher System is prior art. I don't
17 think they are arguing that it is too late. I mean, it is
18 1996 we are talking about. It is more than two or three
19 years before the patents applied for here. There is no
20 evidence -- there is no issue here.

21 But we are talking about, even after they have
22 waived these other elements and they have waived secondary
23 considerations, we still went through and showed you in the
24 record where everything was. And it is definitely in our
25 attachments and in the briefing as well.

1 Go to the next slide.

2 And we will just end, again, with this is a general
3 invalidity verdict. It is difficult to say at this point
4 that something was not specifically met or it was met. I
5 mean, the evidence shows that everything was met.

6 And the jury answered in a general verdict form for
7 each of these. And as this Court knows invalidity is
8 extremely and difficult to get and especially in East Texas.

9 This verdict should be affirmed unless the evidence
10 points so strongly and overwhelmingly in favor of Network-1
11 that reasonable persons could not reach a conclusion -- a
12 conclude -- a different conclusion. That is just not what is
13 happening here. The evidence is replete in the brief, and we
14 ask this Court to affirm the verdict.

15 THE COURT: Thank you.

16 MR. DOVEL: I am going to do a very, very short
17 reply. Regarding public, use you saw no testimony presented
18 on this screen regarding public use. You heard two
19 assertions from Ms. Doan of public use.

20 The first was that Dean Neikirk testified that he
21 had a phone call with Fisher where Fisher told him it was in
22 public use. Those are Ms. Doan's words. There was no such
23 testimony. That is why she didn't show it to you.

24 I invite Ms. Doan if she has the testimony any time
25 before the day is out to put it up here on the screen so the

1 Court can do it. There was no testimony from Dean Neikirk
2 that Fisher told him it was in public use.

3 The second thing she said was, there was this
4 second Fisher System, and that was the one that was used with
5 everyone else and the public. There was no such testimony.
6 Again, Your Honor, no such testimony. She presented you no
7 testimony regarding public use because there was none.

8 Regarding low level current, Your Honor, you saw no
9 testimony from anyone that Woodmas or any system in the prior
10 art would begin start up of an access device. The reason is
11 they presented no such testimony.

12 Moreover, we presented testimony from their expert
13 and our expert that the prior art would not begin start up of
14 an access device, would not meet the Court's instruction. HP
15 simply ignores that. They have got no response for them.

16 Regarding secondary power source, again, they
17 presented you no testimony that any prior art reference
18 disclosed a secondary power source, no testimony from an
19 expert applying the Court's constructions.

20 And, finally, regarding main power source, they
21 presented you no evidence at all. The only thing you were
22 shown were demonstratives, which were not in evidence. They
23 didn't point to a single scrap of testimony, not a line, not
24 a clause, not a single exhibit. There is no evidence of a
25 main power source.

1 Thank you, Your Honor.

2 THE COURT: Thank you.

3 MS. DOAN: Okay. So to say that we don't have any
4 testimony with respect to public use is obviously not
5 accurate because we put it up here in front of the Court. It
6 is on our Slide 19.

7 The question and answer from -- it is always -- I'm
8 so sorry -- it is submitted as Exhibit 6, Page 22, Lines 7
9 through 20.

10 Dr. Neikirk, was Mr. Fisher's system, was that in
11 public use?

12 Yes, I believe it was.

13 The phone call that he had was specifically
14 described on Pages 10 and 11 of his testimony.

15 I mean, I think that was the issue with respect to
16 whether he had a phone call with him or not, and how else
17 could he get this information other than through this phone
18 call and listening to what he said there that day?

19 On Page 10 it is on -- Page 10 the question is --
20 we are talking about the duplicate paragraphs on Line 21. On
21 Line 23, in that same section on the state of the art was the
22 description of what Dr. Fisher told me when I had a
23 conference call with him. And that is referring to his
24 expert report where he talks about the phone call with
25 Mr. Fisher.

1 And I asked: And, indeed -- at the top of Page
2 11 -- and did you do a conference call with Mr. Fisher? And
3 he says: Yes, he did. So we have definitely done that.

4 With respect to -- I can't remember what his
5 challenge was on the second one, but the -- there is an
6 earlier system that Mr. Fisher definitely talked about that
7 was a '95 system. And the second generation system was 1996.

8 And in 1996 the one that was copywritten at 3Com
9 was used openly at 3Com. They specifically tried to induce
10 evidence of some type of concealment. He denied that. There
11 is nothing he knows about with respect to concealment because
12 it was used openly.

13 And there is -- all of the cases that they rely
14 upon deal with concealment, secretive, not use publicly,
15 these are all admissions. There is no admission like that
16 here.

17 Thank you, Your Honor.

18 THE COURT: Thank you.

19 MS. CHO: Your Honor, in addition to granting
20 Network-1's motion as a matter of law on invalidity, the
21 Court should also conditionally grant a new trial on
22 invalid -- on validity on three grounds.

23 First, it is against the great weight of the
24 evidence.

25 Second, a new trial should be granted because

1 inadmissible evidence was admitted.

2 And, third, based on improper closing statements.

3 I will address the first one. The verdict on
4 validity was against the great weight of the evidence.

5 Under Fifth Circuit law a district court may grant
6 a new trial if the jury verdict is against the great weight
7 of the evidence.

8 The following findings which were necessary -- each
9 of which were necessary for the jury verdicts -- I think it
10 is on an automatic slide show.

11 Just one second, Your Honor.

12 (Pause in proceedings.)

13 MS. CHO: Okay. There we go.

14 Okay. The following findings, which were necessary
15 for the jury's invalidity verdict, were against the great
16 weight of the evidence.

17 First, that Fisher was prior art. As we previously
18 explained, for Fisher to be prior art there must be evidence
19 of public use.

20 Second, the low level current. There was no
21 evidence, as we explained, of the low level current, the
22 secondary power source, and the main power source, each of
23 these were against the great weight of the evidence.

24 In fact, there was no evidence at all that Fisher
25 was publicly used or that the prior art disclosed each of

1 those elements. That is the low level current, the secondary
2 power source, or the main power source. And in cases where
3 there is an absence of evidence supporting the jury's
4 verdict, the Court must grant a motion for new trial.

5 Here I have got Fifth Circuit law on the board.
6 Irvan vs. Frozen Food Express. The trial Court will be
7 deemed to have abused its discretion in denying a new trial
8 when there is an absolute absence of evidence to support the
9 jury's verdict.

10 Then there is a Federal Circuit case applying that,
11 Wordtech Systems. A new trial is also required because
12 Wordtech fails to identify proof of elements required. There
13 the elements were contributory infringement. Here they are
14 the elements of invalidity.

15 We had four independent grounds on which there was
16 no evidence. And because there was an absolute absence of
17 evidence on those, a new trial must be granted.

18 I also want to mention that HP has a -- had a
19 waiver argument that they raised on the judgment as a matter
20 of law. That does not apply to motions for new trial. A
21 motion for new trial as against the great weight of the
22 evidence is available regardless of whether a party moves or
23 does not move for motion as a matter of law.

24 Next the motion for new trial should also be
25 conditionally granted because inadmissible evidence was

1 admitted.

2 Where inadmissible is considered that was
3 prejudicial, a new trial should be granted. In Carson vs.
4 Polley, the Fifth Circuit held that the district court, of
5 course, has power to grant a new trial when the jury has
6 inadvertently considered inadmissible evidence and the
7 evidence was prejudicial to the losing party.

8 That is what we have here. As previously
9 explained, corroboration was required to show that the Fisher
10 System was prior art and was publicly use.

11 And Network-1 objected to the admissibility of the
12 Fisher System on the basis that it was not corroborated.
13 However, Mr. Fisher was allowed to testify at length about
14 his system.

15 Mr. Fisher testified that he had a detection
16 system, a detection system that was done just by virtue of
17 the current limit and voltage. He further went on to testify
18 that his detection system involved a staged powering up, a
19 current limit, and an authentication process that followed.

20 None of these things were corroborated at all.
21 There was no corroboration of the fact that Mr. Fisher had a
22 detection system that used a limited current, staged powering
23 up, or authentication.

24 What does HP say in response? They don't identify
25 any testimony where any of this is corroborated or point to

1 anything corroborating any of these things for the Fisher
2 System. Instead, what HP says in its papers is that it
3 relied on other art for these elements. He said this doesn't
4 matter because we showed this existed in other art.

5 This just shows how confusing and prejudicial this
6 would have been to the jury. If HP had intended to rely on
7 other art to show these elements, then why did they play this
8 testimony? The testimony about the Fisher System having all
9 of these elements, that was confusing and prejudicial. That
10 was the only reason to play that testimony.

11 HP also argues, well, we don't have to the
12 corroborate every single detail of the Fisher System. They
13 say, you don't have to corroborate every single thing.

14 Network-1 doesn't contend that every detail of the
15 Fisher System needs to be corroborated, but the important
16 things, the important things that they intend to rely on,
17 those things need to be corroborated. And we know that these
18 were the important details of the Fisher System because that
19 is exactly what HP argued in closing.

20 In closing when they talked about the Fisher
21 System, they described the staged power ups, detection and
22 authentication, and the low current. These were the
23 important things that they wanted the jury to get out of the
24 Fisher System, and absolutely none of it was corroborated.
25 Because of that it was very prejudicial and very confusing to

1 the jury. And it should have been excluded.

2 Finally, the motion for a new trial should also be
3 conditionally granted because of improper closing statements
4 made by HP.

5 Now, what does HP say about this argument? HP says
6 it is waived. In their briefing they say Plaintiff failed to
7 object during its now complained of portions of HP's closing
8 statement. Therefore, it is barred from claiming it is
9 entitled to a new trial.

10 This argument fails. The reason is because under
11 Fifth Circuit law improper argument is a basis for a new
12 trial where substantial justice is at stake. In Alaniz vs.
13 Zamora-Quezada, the Fifth Circuit held: Improper argument
14 may be the basis for a new trial where no objection has been
15 raised only where the interest of substantial justice is at
16 stake.

17 And in In re Isbell the Fifth Circuit goes on to
18 describe when substantial justice is at stake. A closing
19 statement may implicate the interest of substantial justice
20 when counsel's assertions are either false or without basis
21 in the record.

22 And that is exactly what happened here. We have
23 closing statements that were made that were without any basis
24 in the record.

25 First, HP suggested in its closing argument that

1 the low level current limitation is found in Cummings. There
2 was absolutely no basis for that in the record.

3 This is from the closing. It says: So there's so
4 much evidence of this low current going to detection
5 circuitry. Who else do we have?

6 And then they point to: With respect to the
7 Cummings patent, and you'll have the Cummings patent before
8 you. It's DX146. This is another patent that's claiming to
9 have PoE detection as well. It's from April 1995, way before
10 the '930 patent. It's detecting -- it's detecting the
11 connection of such equipment low current power is provided to
12 each of the current loops. You'll have this. It's DX146.

13 Now, Cummings was not part of HP's invalidity
14 contentions. It was not part of their obviousness case. It
15 wasn't part of the obviousness combination at all. They
16 didn't rely on it as disclosing a low level current. Yet
17 these comments were made to show that this low level current
18 was actually in Cummings.

19 And this was particularly prejudicial because the
20 low level current limitation was the limitation that HP's
21 expert Dr. Neikirk had conceded wasn't found in the prior
22 art.

23 So these statements invite the jury to look at
24 Cummings and find the low level current in the prior art
25 themselves even though it is not part of their obviousness

1 contentions. It is very prejudicial.

2 In addition to that, there were statements made by
3 HP that were attributed to Mr. Godici that also had
4 absolutely no basis in the record.

5 I'll put up the excerpt from the transcript. Look
6 at all of the prior art. You know, when Nick Godici, when we
7 were talking about coming and him testifying, he could not
8 believe how much prior art and how much evidence this case
9 had with respect to this patent being invalid.

10 Here is where in the record there is support for
11 that. Absolutely nowhere. There is no support anywhere in
12 the other trial transcript that suggests that Mr. Godici ever
13 made these comments about the amount of prior art that there
14 was with respect to this patent being invalid.

15 Mr. Godici never testified about this at trial at
16 all. And here the statement was particularly prejudicial
17 because the jury had already been told that Mr. Godici is the
18 former chairman of the United States Patent and Trademark
19 Office. Thus, the jury is being led to believe that the
20 former chairman of the Patent and Trademark Office believes
21 there is lots of evidence with respect to this patent being
22 invalid.

23 That was highly prejudicial and completely without
24 basis in the record. Because of that, that the motion for
25 new trial should also be conditionally granted.

1 Unless Your Honor has any questions.

2 THE COURT: I do not. I do not. Thank you.

3 MS. CHO: Thank you.

4 MS. DOAN: Your Honor, the motion for new trial
5 should also be denied on invalidity. And let me just touch
6 briefly. I'm not going to cover all of the parts on
7 corroboration and the other issues that we have already
8 argued earlier this afternoon with respect to the great
9 weight of the evidence. But I do want to show what the
10 evidence was and the standard is with respect to the Fifth
11 Circuit and this Court.

12 This Court says: But the burden a movant must meet
13 is high. A motion for new trial should not be granted unless
14 the verdict is against the great weight of the evidence, not
15 merely against the preponderance of the evidence. This Court
16 is not to reweigh the evidence.

17 I know that Network-1 disagrees with the weight of
18 the evidence, and they perhaps don't believe that it is clear
19 and convincing. But the jury thought that it was. And the
20 jury is the one that decides. And the burden to set aside
21 that verdict and have a new trial on that issue that we have
22 tried for six days with all of experts and witnesses that
23 came in from everywhere, is a burden they have not yet met.

24 And here is why. First of all, it is against the
25 great weight of the evidence. Listen to what the evidence

1 was. We have Dean Neikirk and all of his testimony. We have
2 the prior art patents. We have three with respect to Fisher,
3 and then we have a European patent from Fisher. We have two
4 with respect to -- we have a Chang patent and a European
5 patent and then we have the Woodmas patent.

6 We have this Court's claim construction. We have
7 Fisher System itself. We have pictures of the Fisher System
8 that have been labeled by Mr. Fisher. And we have
9 Mr. Fisher's testimony.

10 And let's not forget we also have Mr. Horowitz's
11 testimony, the CEO of Network-1 where he also knows that this
12 patent may be obvious, and there were other detection systems
13 out there more than 15 years ago. So the great weight of the
14 evidence is, indeed, that the patent is invalid.

15 I'm sorry.

16 When Ms. Cho was talking about corroboration,
17 again, she is quoting to Finnigan. And I think we have
18 addressed Finnigan; but as this Court knows, Finnigan was the
19 case where there was -- it is anticipation, not combination
20 for obviousness. And it is also just the testimony of the
21 inventor without any type of product, drawings, or patents.
22 Here we have all three, so it is definitely very different.

23 With respect to Mr. Fisher's specific testimony,
24 staged power up, limited current, and authentication, these
25 were not -- and we specifically told the jury these were not

1 the four points that we were making with respect to the
2 Fisher System.

3 The Fisher System was made with respect to data
4 node, access device, data signaling pair, and main power
5 source. That was shown through the Fisher System, not the
6 other three. But we went ahead and played -- they did not
7 object to those specific questions coming in.

8 Then later on we did go back and talk about the
9 state of the art when this invention was coming out and not
10 just with the Fisher System and the limited current, because
11 as this Court will recall, Mr. Fisher knew about the specific
12 type of low level current.

13 He didn't call it a low level current. He called
14 it a current that was sufficient to begin start up but
15 insufficient to sustain start up, and he knew about that type
16 of current, but he decided not to go with that and went with
17 a different type of current.

18 So, if anything, they could argue that it is
19 teaching away, but that is not what we pointed out from low
20 level current was not Fisher's testimony anyway. So their
21 objections at this late date are of no event and actually
22 should definitely not only be sustained but point to the
23 other way.

24 With respect to the improper closing arguments,
25 let's delve straight into that because I do think it is a

1 personal attack.

2 You specifically instructed the jury what you
3 should base your decision on is the evidence that you will
4 hear from the witness stand and by deposition and the
5 exhibits that I admit into evidence. You will rely on this
6 evidence in making your decision as to the verdict in this
7 case.

8 Then you went on to say: After I instruct you on
9 the law, the attorneys will have an opportunity to make their
10 closing arguments. Statements and arguments of the attorneys
11 are not evidence and are not instructions on the law. They
12 are intended only to assist you in understanding the evidence
13 and the parties' contentions.

14 The Fifth Circuit law is: The plaintiff's failure
15 to object to the impropriety of the defendant's closing
16 argument, bars it from urging the improper arguments as
17 grounds for new trial after the jury returns its verdict.

18 This is not a case where Mr. Dovel does not know
19 how to object during closing argument. In fact, he did
20 object during closing argument, as this Court will recall.
21 And asked a sidebar. And asked us to redo something. And
22 that was on the oscillating power source that was already in
23 evidence on the preferred embodiment, and he asked us to
24 rephrase that, and we thought that all worked out. That was
25 on Page 110 of the record during my -- during HP's closing

1 argument.

2 So he knows how to object, but didn't object to
3 either the Cummings issue or to the Godici issue that they
4 are raising now. So they are completely waived at this
5 point.

6 And before I go any further, go back one more
7 slide. No, no, I'm sorry. Go back one. Yes.

8 When you are talking about closing arguments to the
9 jury, and you are telling them specifically that it is just
10 attorney argument, it is Mr. Dovel that in the last motion,
11 he puts up our closing argument of evidence of lack of low
12 level current.

13 You cannot have it both ways. You cannot say that
14 closing argument is evidence and then closing argument is not
15 evidence. It is not evidence. It is not evidence to sustain
16 anything they have with respect to low level current, and
17 it's definitely not evidence with respect to anything we say
18 with respect to Cummings and Godici.

19 But let's look specifically at what actually came
20 into evidence with respect to Cummings and Godici because
21 that is where the heart of the matter is.

22 Dr. Davis did -- the Cummings patent, DX146, is in
23 evidence. It was in evidence before closing. And anything
24 that is in evidence can be used for any purpose. Dr. Davis
25 said -- and the question: Did the '930 patent inventor

1 invent the idea of doing detection of remote equipment over
2 Ethernet lines?

3 He says: No, they didn't.

4 Is there something you're aware of, some prior work
5 that you're aware of that touched on that?

6 And he said: Yes, sir. I show on the next slide a
7 patent issued to Cummings.

8 And the question is: Can you tell us what you are
9 looking at here and explain what you mean by that?

10 Yes, sir. The left side is the front page --

11 And if you will switch now, Josh to go over --

12 This is the Cummings patent that actually came in,
13 DX146. This is what actually came in and was used at
14 closing. It is the same thing that was used with Dr. Davis
15 during his testimony.

16 And if you'll look on the abstract, the part that
17 is highlighted, detecting the disconnection of such equipment
18 from the network, a low current power signal is provided to
19 each of the current loops. That is the quote that they are
20 complaining of that we made during closing argument. And
21 10BaseT communication link. And it is patent dated April
22 11th, 1995. All of this came in through Dr. Davis.

23 So go back to Dr. Davis's testimony.

24 He specifically goes on to say: Yes, sir, the
25 front page on the left, on the right some things have been

1 blown up. The inventor's name is Mr. Cummings. The patent
2 was actually issued in April 1995. And then out of the
3 abstract they describe what it is this patent does.

4 And in three highlighted sections we see that they
5 are wanting to do detection of the disconnection of equipment
6 from the network. And the second highlighted section the way
7 they are going to do what is with a low level -- the low
8 current power signal that's provided to something they call a
9 current loop. And they then -- down at the bottom, it says:
10 This the invention is particularly adapted to be used with an
11 existing 10BaseT communication link. 10BaseT is slang for an
12 Ethernet network.

13 So we look at what was said actually during closing
14 argument, and I am on Page 131 of HP's closing argument, and
15 I am on Line 20.

16 With respect to the Cummings patent -- and you will
17 have the Cummings patent before you. It is DX146. This is
18 another patent that is claiming to have PoE detection as
19 well. It is from April 1995, way before the '930 patent. It
20 is detecting -- it is detecting the connection of such
21 equipment. Low current power is provided to each of the
22 current loops. You will have this. It is Exhibit No. 146.

23 And we went through various other types of
24 detection systems because Mr. Horowitz had already told the
25 jury there are other detection systems that are out there

1 that may render this obvious. Cummings was just one of them.

2 Dave Dwelley testified about other detection
3 systems. He talked about the signature resistor method that
4 had been adopted by the IEEE. There was also testimony about
5 different detection systems that came in that were presented
6 to the IEEE. There was also other detection systems that
7 were covered as well throughout the testimony.

8 This is just one they complain of because they
9 somehow think that I am saying that it is low level current.
10 I am not saying that. I am saying it is the low current
11 power because that is exactly directly from the abstract --

12 On the prior page.

13 -- from the abstract, and it is exactly what
14 Mr. Davis had in his testimony. There is nothing improper
15 about that argument. But if there had been something
16 improper about that argument, Mr. Dovel should have objected
17 at the time, and he clearly knew how to object because he had
18 already objected before in this closing argument.

19 Next slide.

20 Now, let's look at what they have got -- yes, with
21 respect to what we talked about Mr. Godici and the prior art,
22 and they said that somehow he did not talk about the prior
23 art, and as you know he did not talk about the prior art in
24 mapping the prior art at all to the patent. That was left to
25 Dr. Neikirk.

1 But he did go through not only the prior art and
2 what was not considered but what was considered by the Patent
3 Office so that that they would know what had been considered
4 already and what had not been considered already.

5 And then we have the pages -- Slide No. 64.

6 But after we put on his direct testimony when he
7 covered what prior art was considered and not considered,
8 then it was Mr. Dovel which approached this Court that said,
9 I just want to the put on this IDS, and I want to take him
10 through that prior art as well. So PX253 came into evidence,
11 and he listed all of the prior art, went over the prior art
12 of the different patents that had been out as well. So there
13 was lots of prior art that was discussed by Mr. Godici.

14 He had not done any type of analysis. And we did
15 not say that he had done any type of analysis. He did
16 discuss lots of prior art, and there is lots of prior art in
17 this particular case. There is nothing improper about that
18 argument, certainly nothing improper to cause a motion for
19 new trial now when they waived the argument by not objecting
20 at the time it came in.

21 For all of these reasons, Your Honor, we ask that
22 the motion for new trial be denied.

23 THE COURT: Thank you.

24 MS. CHO: I just want to make a couple of really
25 brief points in rebuttal.

1 First on the argument about waiver on the motion
2 for new trial based on arguments that were made on closing.
3 I have Fifth Circuit law on the board. It is on Slide 16.
4 There is no waiver if substantial justice is at stake. Then
5 the Court can still grant a motion for new trial based on
6 closing arguments.

7 And substantial justice is at stake where closing
8 arguments are made that are without a basis in the record or
9 are false. So we would say this applies here. There is no
10 waiver on these closing arguments.

11 The next point that I want to make is, as Mr. Dovel
12 explained, there was an absence of evidence in HP's case
13 about Fisher on public use and that the prior art disclosed
14 the low level current, secondary power source, and the main
15 power source.

16 And where there is a complete absence of evidence
17 on a required element, the motion for new trial is required
18 under Fifth Circuit law.

19 MS. DOAN: Very briefly, Your Honor.

20 With respect to substantial prejudice, and I
21 have -- don't have the case that Ms. Cho had up, but I am
22 aware of cases that deal with substantial prejudice; i.e., a
23 plaintiff's lawyer making the argument that the defendant has
24 lots of insurance coming in during closing argument and
25 getting a new trial on that.

1 I am also aware of inappropriate use of the Golden
2 Rule coming in during closing argument. That would be
3 substantial prejudice. But actually talking about prior art
4 that Mr. Godici had mentioned because he did mention prior
5 art in his testimony or talking about the exact same thing
6 that Dr. Davis talked about with respect to the Cummings
7 patent and reading from the abstract of the Cummings patent
8 with low current power is not appropriate argument.

9 Thank you, Your Honor.

10 THE COURT: Thank you.

11 Mr. Dovel, before we proceed to the next motion,
12 let's take a very short break.

13 (Recess was taken at this time.)

14 THE COURT: Be seated. Mr. Dovel, you may proceed.

15 MR. DOVEL: Your Honor, now we turn to the subject
16 of infringement in the jury verdict of infringement.

17 For this, Your Honor, we seek a new trial because
18 the verdict was against the great weight of the evidence. It
19 is important that Your Honor when ruling on this would keep
20 in mind that, as the Fifth Circuit has held, a verdict can be
21 against the great weight of the evidence even if there is
22 substantial evidence to support it.

23 For this motion the Trial Court, Your Honor, does
24 not need to take the view of the evidence favorable to the
25 winner. Instead, Your Honor is going to actually weigh the

1 evidence. That is what you are going to do in ruling on this
2 new trial motion. This is the Shows case, which is the --
3 recognized as the leading case in the Fifth Circuit on this
4 subject.

5 And when you weigh it, Your Honor, you are going to
6 conclude that the great weight of the evidence favored a
7 finding of infringement, not non-infringement.

8 Now, there are two elements that we are arguing
9 that are the subject of our motion. One is the low level
10 current element. The other is the main power source. I am
11 going to start with low level current.

12 And the place I am going to start with low level
13 current is this "sufficient to begin start up." HP's
14 arguments all focused on that arguing that their current was
15 not sufficient to begin start up. That is what they were
16 trying to establish.

17 In understanding that, Your Honor, what we are
18 going to show you is that, in fact, they didn't actually put
19 on any evidence addressing that. They instead addressed
20 something else, whether their current was sufficient to start
21 up.

22 To understand the importance of that, Your Honor, I
23 am going to go back to the claim construction because this
24 issue was actually ruled on. This was one of the primary
25 issues that was argued in the papers and in oral argument at

1 claim construction, and the Court issued an express ruling on
2 this.

3 And the ruling was that begin start up and start up
4 are two different things. Begin start up is when components
5 of an access device start up. And start up is when the whole
6 thing is starting up.

7 And what we pointed out to the Court during claim
8 construction was that in the patent it talks about an access
9 device, a telephone -- I have a picture of it on the screen.
10 It is very similar to the one that HP showed the jury.

11 And for it to begin start up, it wasn't the case
12 that this phone itself started up. Instead, it was just a
13 single component down inside the phone. I have got that on
14 the screen now. A DC/DC switching supply would begin to
15 start up.

16 And based on that -- and here I have got the
17 Court's order, Markman ruling right on the screen. The Court
18 ruled: The current need not be sufficient to result in a
19 completed start up. The current must be sufficient to begin
20 start up rather than cause start up, thus eliminating any
21 implication that the current must be sufficient to result in
22 a completed start up.

23 The Court ruled that HP's attempt to read that into
24 the claim is wrong. The low level current doesn't need to
25 start up an access device. It only has to begin start up, to

1 begin with certain components, not start up the entire access
2 device.

3 The Court expressly ruled: It need not be
4 sufficient to result in a completed start up.

5 So when Your Honor weighs the evidence, you have
6 got to credit evidence that addresses the Court's actual
7 construction, begin start up. And you have got to give no
8 weight to HP's evidence that addresses whether their current
9 would cause an access device to start up.

10 Dr. Neikirk, their infringement expert, after the
11 Court issued this claim construction ruling, agreed exactly
12 this point. And here is his testimony: To be a low level
13 current, does the current have to be at a level sufficient to
14 begin start up of all of the components?

15 No, it doesn't say that.

16 If you have a detection current that is sufficient
17 to begin start up of a portion of the access device, would
18 you agree that that current is sufficient to begin start up
19 of the access device?

20 ANSWER: That would meet the requirements for a low
21 level current, so I would agree.

22 Now if we look at -- put on the screen now -- this
23 is the photo of their access device that HP used at the trial
24 and the demonstration that they provided to the jury.

25 To determine whether this access device begins

1 start up, we don't look at whether it starts up. That is, we
2 don't look at the end of the process, whether the lights go
3 on and the screen starts up. That is when we have got a
4 completed start up.

5 Instead, we look at the beginning of the process.
6 Begin start up for a device just like with the preferred
7 embodiment in the patent, is going to start down inside the
8 device. You have to look down inside the circuitry, and HP
9 showed us that diagram as well.

10 We have got to look and see whether the components
11 inside that access device begin to start up.

12 We submitted evidence of overwhelming weight on
13 that point. And as it turns out -- I am going to show Your
14 Honor -- it was actually undisputed. You will recall that
15 Dr. Knox, he walked through a diagram, a circuit diagram of
16 the components that were affected by the detection current,
17 and he showed the path of the current and showed and
18 highlighted in yellow all of these components.

19 And then he testified, he was asked: Do these
20 components begin to consume power? Did they begin to start
21 up?

22 ANSWER: Yes.

23 Can you explain why?

24 Well, first off, you can measure the power that
25 they consume.

1 How do you know it is beginning to start up?

2 Well, we have got diodes that have gone above a
3 certain threshold. They have transitioned to conducted
4 state. We've got transistors in this integrated circuit that
5 have made decisions. Capacitors that have charged up.

6 He talked about this yellow rectangle, the
7 integrated circuit, and he said it had more components down
8 inside of it. And he analyzed those. He said: They are
9 active components in there. They take on certain states when
10 there is a low level current. Active components.

11 As a result, portions of the device are
12 operating -- when portions of the device are operating, the
13 devices begin to start up.

14 Dr. Knox's testimony on this point was not in any
15 way impeached or rebutted or diminished on cross-examination.

16 And then, Your Honor, we got similar testimony from
17 HP's witnesses. When HP's witnesses were asked specifically
18 about the components of the access device and whether they
19 would begin to start up, they had to agree that they did.

20 Here, for example, is David Tremblay. He was their
21 engineer. He is the one who did this demonstration that
22 showed the outside of the phone not starting up.

23 But he was asked this specific question: Can you
24 tell us whether the components that Mr. Dovel covered on
25 P122, do they or do they not work during detection during the

1 detection phase?

2 ANSWER: Yes, ma'am, several of those do work,
3 several of those do work during the detection phase.

4 So Mr. Tremblay, their own engineer, admitted, yes,
5 these components that we went through, they do work during
6 the detection phase.

7 Their expert Dr. Davis, he admitted that the level
8 that would be -- if we actually look at the measured amperage
9 that would be sufficient to start up the access device, the
10 level would be 100 microamps.

11 100 microamps would be sufficient to begin start
12 up.

13 It is starting the device, yes.

14 He further testified that: When the current level
15 is at .1 milliamp, the start up of the access device will
16 have already taken place. That is the same as 100 microamps.

17 So we have testimony from Dr. Davis definitively
18 establishing the level that is required, what current level,
19 what is our level that is required.

20 And he then further admitted that HP's detection
21 currents were all above that level. They were all above the
22 level required for start up.

23 And he then further admitted that HP's detection
24 currents were all above that level. They were all above the
25 level required for start up, between 165 and 275 microamps.

1 So when we actually look at the actual -- the
2 correct question, which is, what is the level required to
3 begin start up, HP's witnesses agreed with Dr. Knox that they
4 would.

5 Dr. Davis gave additional testimony.

6 Would you agree, sir, that if an access device
7 begins to start up, it has a component that's consuming
8 power?

9 ANSWER: I think that would be fair, yes.

10 Let's go back to the diagram. Do each of those
11 components begin to consume power from the detection current?

12 ANSWER: A little bit, yes.

13 So they are all consuming power.

14 He was asked specifically about some of these
15 components that are part of the integrated circuit that the
16 detection current passes through and whether these components
17 are activated.

18 Do you agree that this yellow triangle thing, this
19 detection comparator is an active component?

20 ANSWER: Yes.

21 Mr. Dwelley, David Dwelley also agreed.

22 This triangle, what is it called?

23 That's a comparator.

24 Is that an active component as well?

25 It is, yes.

1 He also agreed that the detection current will be
2 sufficient to charge the capacitor. He said the detection
3 current must charge that capacitor.

4 So when asked about the components, the
5 overwhelming weight of the evidence showed that HP's
6 detection current would be sufficient to begin start up, to
7 start up components of the access device.

8 Mr. Tremblay's testimony that I put on the screen
9 here, Exhibit 20 -- or Slide 22, they don't have an answer
10 for it. They have no explanation for this. They have no way
11 around it. It is conclusive on the issue. It certainly
12 establishes the great weight of the evidence. The components
13 do work during the detection phase.

14 Now, HP, what they do -- what they did at trial was
15 rather than engage on that issue, an issue that established
16 that they do infringe, they did two things to submit what I
17 call pernicious testimony, that is, invidious testimony,
18 testimony that doesn't actually prove what they want, that
19 actually is designed to fool the jury.

20 The first was they presented hours of testimony in
21 which they substituted start up for begin start up. They did
22 exactly what the Court ruled could not be done in claim
23 construction. The Court ruled that to begin start up doesn't
24 require completed start up. You don't have to start up an
25 access device. You don't have to turn it on. You just have

1 to begin start up.

2 But HP's entire infringement case on low level
3 current was based on this pernicious substitution.

4 For example, Mr. Tremblay they had him do a
5 demonstration, and he testified that it doesn't meet the
6 Court's construction. It doesn't begin start up. Why is
7 that? Is it because it doesn't turn on components? No.

8 Here is what he said: The phone is not on.
9 There's no lights turning on. There's no display. Can't
10 make a phone call with it. It's non-operational. The phone
11 is not usable.

12 He is supplying the test rejected by the Court. He
13 is applying the test that it must result in start up of the
14 access device.

15 He continued: The phone has not begun to turn on.
16 The phone is not sustaining the power. It's not functioning.
17 You can't make a phone call with it. Those currents would
18 never allow this IP phone to begin to sustain start up.

19 So here he is openly stating that his current will
20 not sustain start up. But that is not the test. It just has
21 to begin. In fact, to be a low level current it must not
22 sustain start up. It must not reach operational levels.

23 Let me go to our Slide 34.

24 I asked him directly about this. In this
25 admission, again, they have got no response to this.

1 As you were just using the phrase "begin start up,"
2 were you referring to the point when the device gets
3 operational power and begins to do its operational functions?

4 ANSWER: Yes, sir.

5 He said that: When this device gets greater than
6 30 volts, that enables that device to begin and sustain that
7 start up.

8 So as he testified, as he was presenting his
9 testimony, he was doing this substitution that the Court in
10 the claim construction had ruled should not be done. He was
11 saying, yes, this current, the reason it doesn't meet the
12 Court's construction, is because it doesn't begin start up.
13 And by begin start up, I mean start up. Operational power.
14 It performs its operational functions.

15 We can't see that the light is on. We can't see
16 that -- you can't make a phone call with it.

17 Dr. Davis admitted the same thing. This is
18 Slide 35. He explained to the jury how he was applying low
19 level current.

20 And he says this: And the way this low level
21 current is going to work is that it is going to start up the
22 access device. He is substituting start up for begin start
23 up. He is requiring that the detection current actually
24 start up of the access device.

25 He testified over and over. We quoted pages of it

1 in our brief. Here is a few examples.

2 He says: The access device has not started up yet.
3 We observed the phone was not doing anything. We don't turn
4 on the access device until we've got at least 30 volts.

5 The access device has got to receive 30 volts in
6 order to turn on and begin to operate. When we get above 30,
7 we saw the phone turned on, and it would have been
8 operational.

9 But that is not begin start up, Your Honor. That
10 is the end of the process when it is already started up. So
11 they presented literally hours of testimony from the Tremblay
12 and Davis on the very premise that the Court had rejected in
13 claim construction. Begin start up does not mean start up.
14 That was testimony that should be given no weight.

15 They didn't present testimony, they did not present
16 testimony from their engineer or from Davis or from anyone
17 else that this detection current was insufficient to begin
18 start up, to start up certain components in the access
19 device. In fact, as we just saw, each of their witnesses
20 admitted that it certainly would start up components in the
21 access device.

22 The next thing they did, Your Honor, the second
23 thing is this: They said, well, these components that are
24 started up, they are not part of the access device or part of
25 the operational circuitry of the access device.

1 Here is Mr. Tremblay. He is asked this: When the
2 access device -- during the detection phase does the
3 operational circuitry get used?

4 No, ma'am, it does not.

5 QUESTION: Even though it is consuming some current
6 in the access device, that's not going to be the operational
7 circuitry side?

8 ANSWER: That's absolutely correct.

9 Davis provided snippets of similar testimony. When
10 they gave that testimony, in fact, it was false and they knew
11 it was false, as we demonstrated at trial.

12 First of all, the first thing they are suggesting
13 is, well, maybe this stuff that starts up is not actually
14 physically part of the access device. But the evidence
15 showed these components were located in the physical core of
16 the access device.

17 This is our Slide 39, and you can -- it depicts a
18 photograph -- a depiction that was used by Dr. Davis, and on
19 it he identified the PoE chip. That is that yellow chip from
20 the earlier diagram. And showed where it was located. And
21 Dr. Knox then identified where the transistors were located
22 physically.

23 And you can see that these components are located
24 in the physical core of the access device. They are not
25 separate from it in anyway.

1 Next HP suggests that, well, maybe they are not
2 part of the access device when it is actually operating as an
3 access device, but that is simply not true, as we
4 demonstrated at trial.

5 The Court defined access device. An access device
6 is a device that can receive and transmit data over a
7 network. So the components of an access device that make it
8 an access device are those used when it receives and
9 transmits data over a network.

10 And the evidence undisputedly -- was undisputed
11 that each of those components that we identified that start
12 up are components that are part of the access device with
13 that definition.

14 Dr. Knox testified -- was asked this: When the
15 access device is actually operating, are these essential
16 components.

17 He said: Yes, if you removed, for example, that
18 steering diode or this chip or the transformers, the whole
19 thing would just stop operating. He explained that these
20 transformers are used to separate data. You need
21 transformers even if you're just going to send and receive
22 data.

23 The transformers were the parts of the access
24 device that actually interconnected with the network, the
25 actual physical components that did the receiving and

1 transmitting of data. They are the most important thing, the
2 single -- the most important single component of an access
3 device.

4 Now, what about HP's witnesses, did they disagree
5 with this when they were asked the specific questions about
6 these components? No, they admitted that all of these
7 components are part of the operational circuitry, the access
8 device.

9 Here is Mr. Tremblay, their engineer: Is the
10 center tap itself used when it's fully operational?

11 ANSWER: Yes.

12 This is part of the operational circuitry of the
13 access device, true?

14 It is part of the -- that particular component is
15 the connection medium, yes.

16 Part of the operational circuitry, true?

17 ANSWER: Yes, sir.

18 That is an unambiguous admission. And what that
19 means, Your Honor, is that when he testified earlier in
20 response to HP's questions that they are not part of the
21 operational circuitry, he wasn't telling the truth. He was
22 trying to fool the jury.

23 When confronted with the actual components, he
24 admitted that, yes, they were part of the operational
25 circuitry.

1 His testimony continued: Let's go one at a time.
2 The center tap transformers are used during full operation,
3 right?

4 ANSWER: Yes, sir.

5 The diodes are used during full operation?

6 Yes, sir.

7 The capacitor?

8 Yes, sir.

9 What about Dr. Davis, their expert? He tried on
10 direct examination with HP to say the same thing, they are
11 not part of the access device, they are not part of the
12 operational circuitry. But on cross-examination when
13 actually confronted with the actual components, he had to
14 admit that all of them were part of the operational
15 circuitry.

16 An important part of the operation of this access
17 device is the center tap transformer would be in place,
18 right?

19 ANSWER: Yes.

20 There were certain components that the detection
21 current went through that were used during the operation of
22 the access device when it was fully operational, true?

23 ANSWER: Yes, sir.

24 Those components that are used during the
25 operation, operational circuitry, it includes the center tap

1 transformers, right?

2 ANSWER: Yes.

3 Same question for the diode.

4 Yes.

5 Same question for the capacitor.

6 It is used during the operation of the access
7 device?

8 The PoE chip is used during the operation?

9 It does functions, yes.

10 So each of those components when HP's witnesses
11 were actually confronted with them and what they actually do
12 in the access device, admitted that they were operational
13 components of the access device, part of the operational
14 circuitry.

15 HP's effort to say that they are not part of the
16 operational circuitry was simply pernicious and designed to
17 fool the jury. But it can't fool this Court when weighing
18 the evidence. Your Honor can't credit their simple
19 conclusion, oh, they are not part of the operational
20 circuitry when they provided on cross-examination detailed
21 admissions, pointedly -- as on point as possible that they
22 were part of the operational circuitry.

23 THE COURT: Mr. Dovel, you are out of time.

24 MR. DOVEL: I will wrap up then, Your Honor.

25 We also in our papers explain why the main power

1 source evidence would be against the weight of the evidence,
2 and we will rely on our papers for that.

3 Thank you, Your Honor.

4 THE COURT: Thank you very much.

5 MR. MEHTA: Good afternoon, Your Honor.

6 THE COURT: Good afternoon.

7 MR. MEHTA: Network-1's motion for a new
8 infringement trial should be denied. The jury's
9 non-infringement verdict rests on ample evidence properly
10 applying all of the Court's claim constructions.

11 Now, Mr. Dovel started out by talking about the
12 Shows Fifth Circuit case from 1982. The standard is set
13 forth in the Dawson case that is quoted on Slide 2 of this
14 deck.

15 The verdict must be affirmed unless the evidence
16 points so strongly and overwhelmingly in Network-1's favor
17 that the Court believes that reasonable persons could not
18 arrive at a contrary conclusion.

19 For the reasons we have explained in the papers and
20 for the reasons I will explain now, Network-1 falls far short
21 of the standard laid out in Dawson.

22 Now, as Your Honor knows, Network-1 bears the
23 burden of proving infringement. And despite the fact that HP
24 bears no burden on infringement, HP conclusively established
25 at trial that three separate patent claim elements are

1 missing from every one of HP's products.

2 Mr. Dovel just spent the entirety of his
3 presentation on the third element, low level current. It is,
4 as set forth in detail in our brief, two other claim elements
5 are missing. We conclusively established that.

6 I will start with the first element, which is the
7 phrase "delivering a low level current from said main power
8 source."

9 This is an example of where this phrase appears.
10 It is in Claim 6 of the '930 patent. This term appears in
11 all of the asserted claims. There is no dispute about that.

12 Now, I will talk about low level current
13 separately, and I will talk about main power source
14 separately. But the Court has not construed the phrase "from
15 said main power source." In fact, this was raised during
16 claim construction, and the Court found that the term "from
17 said main power source" requires no construction. It is to
18 be given its plain and ordinary meaning to persons of skill
19 in the art.

20 At trial HP's non-infringement expert Dr. Davis
21 presented this demonstrative to the jury. And as a quick
22 aside, Mr. Dovel earlier mentioned that Dr. Neikirk was our
23 non-infringement expert. I know that is late in the day.
24 That's simply incorrect. Dr. Davis is our non-infringement
25 expert. Dr. Neikirk testified at trial on the issue of

1 invalidity.

2 In Dr. Davis's slide on the left side, Dr. Davis
3 shows an excerpt of Claim 6. The top portion is highlighted
4 in teal. The bottom portion is highlighted in yellow. And
5 these are the two requirements in the claim of the term "main
6 power source." I will be focusing on the bottom requirement,
7 which requires that delivering a low level current from said
8 main power source to the access device.

9 That's represented by the yellow dashed line in the
10 figure right below the claim language. And, as Your Honor
11 can see here, the power source box 16 on the left side, there
12 is a yellow line extending from that. That represents that
13 the low level current must be delivered from the main power
14 source.

15 Now, on the right side of this figure is how HP
16 switches work, and I will show you the testimony that
17 supports this in a moment.

18 But as the jury heard at trial, there are separate
19 boards on HP's Power over Ethernet switches. On the bottom
20 left is the power supply board. And on the power supply
21 board are multiple power supplies.

22 On the right side is the PoE board, the Power over
23 Ethernet board. And on the PoE board are PoE chips. It is
24 from those chips the detection currents, the alleged low
25 level current, are generated and delivered. They are never

1 delivered from any of the power supplies. In fact, they
2 don't even exist at the power supplies.

3 You don't have to take my word for it. Every one
4 of our three witnesses that we put up on this, supported that
5 the detection current in HP's switches, in every one of HP's
6 switches is never delivered from the main power source. It
7 is always delivered from a PoE chip.

8 This is Mr. Tremblay. He is HP's resident expert
9 on Power over Ethernet. He is a distinguished technologist.
10 Mr. Tremblay testified that the detection and the
11 classification currents are coming out of this Power over
12 Ethernet chip.

13 And just backing up, the PoE chip he is referring
14 to is the PoE chip on the board on the right side as shown
15 here in Slide 7.

16 He said it is coming out of this Power over
17 Ethernet chip, which here's one of them. There are two of
18 them. And that's where the detection voltages originate
19 from.

20 The PoE chip creates the detection currents and
21 delivers them to what is on the other side of the cable.
22 They don't exist at the power supply. They don't exist at
23 any of the power sources, and, therefore, they cannot be
24 delivered from any power supply or power source. This is
25 true of every one of HP's accused Power over Ethernet

1 switches.

2 This is Mr. Tremblay again on cross-examination.
3 Mr. Dovel asked him a specific question as to whether the
4 detection currents come from a power supply or not.

5 QUESTION: As you understand it, the detection
6 current comes from a power supply of some kind, right? We
7 don't have to debate that. It's from some kind of power
8 supply, right?

9 ANSWER: The detection currents come from a Power
10 over Ethernet chip or controller.

11 Your Honor, there is no dispute in this case that a
12 Power over Ethernet chip is not a power supply. It is not a
13 power source. A controller is not a power supply, and a
14 controller is not a power source. Again, there is no dispute
15 about that.

16 Mr. Tremblay wasn't alone. We also put up
17 Mr. Dwelley. Mr. Dwelley spent 29 years at Lanier
18 Technologies developing and overseeing the design of Power
19 over Ethernet chips, the kind of chips that go into HP's
20 products, the kind of chips that go into HP's competitors'
21 products.

22 QUESTION: Are you saying that the detection
23 currents themselves are actually generated in the Linear
24 chip?

25 ANSWER: That's correct.

1 Now, it's not just Linear's chips that generate and
2 deliver the detection currents. Mr. Dwelley testified that
3 the PoE chips that are made by Linear's competitors work
4 essentially the same way in terms of how they generate
5 currents, in terms of how they deliver detection currents.

6 All of these PoE chips used in HP's switches
7 generate and deliver detection currents. They don't come
8 from any power source. They don't come from any power
9 supply, and that is what the claim requires. Our products
10 work a very different way.

11 The same with Dr. Davis. Looking at the bottom of
12 question and answer here: That is what delivers the
13 detection currents?

14 Yes.

15 He is referring to the Power over Ethernet chip as
16 shown in the top Q and A here.

17 Now, Mr. Dovel didn't address this claim limitation
18 at all today. Network-1 didn't address this claim limitation
19 at all in its opening brief. The first time it addressed
20 this claim limitation is in its reply brief, post-trial.

21 And what Network-1 said is HP asserts that in its
22 switches, a downstream PoE chip limits the current delivered
23 from an upstream power source. That is simply not what we
24 said. And Mr. Dwelley's testimony here exemplifies that.

25 QUESTION: Are you saying that the detection

1 currents themselves are actually generated in the Linear
2 chip?

3 ANSWER: That's correct.

4 Mr. Dwelley is not saying that the PoE chip limits
5 the current. He is saying it generates and delivers the
6 current.

7 Network-1 also argued: This narrowing limitation
8 rejected by the Court is what HP asserts as a basis for
9 non-infringement; that a main power source must be where the
10 detection current is created.

11 Again, that is simply not correct. Our witnesses
12 all testified that the PoE chip delivers the detection
13 current. And they followed the exact language of Claim 6
14 that the low level current be delivered from the main power
15 source.

16 Along the way they surely testified about where it
17 is generated and where it is created. That wasn't the basis
18 for non-infringement. The basis for non-infringement is that
19 our products don't deliver detection currents from a power
20 source or power supply of any kind. And you can see that in
21 Dr. Davis's testimony here.

22 Now, Network-1 on this point seems to reference
23 that somehow HP is barred from talking about where these
24 detection currents are created or generated. And it
25 references one of the Court's claim constructions for that

1 proposition.

2 A review of that Markman order will show that they
3 are incorrect about that. But, you know, their own expert
4 Dr. Knox, his own testimony defeats that argument. Dr. Knox
5 stated, quote: One of the requirements, one of the steps, if
6 you will, of this claim is that we need to deliver a low
7 level current. In other words, we have to have a low level
8 current from the main power source. That's where it has to
9 originate.

10 Their own expert Dr. Knox takes the position that
11 delivering a low level current from a main power source means
12 that the low level current has to originate from the main
13 power source. So their argument fails for that additional
14 reason.

15 On that first point I want to emphasize something
16 because it is important. Network-1 bears the burden of
17 proving infringement. You will see no evidence either in
18 their briefing or today from Mr. Dovel, you will see no
19 competent evidence that in any of HP's products a detection
20 current is delivered from a power source or a power supply of
21 any kind. They simply don't have that.

22 At best they have a misplaced analogy from their
23 expert Dr. Knox. But that is not the way that our products
24 work. And we have just shown that from testimony from three
25 separate witnesses. For that reason alone Network-1's motion

1 should be denied.

2 For a second reason, there is no main power source
3 in any of our switches. And for the second reason their
4 motion should be denied as well, and I will explain.

5 We looked at this demonstrative. The power source
6 box 16 on the left has to do two things according to every
7 one of the asserted claims. We talked about one of the
8 requirements, the yellow one, delivering a low level current
9 from the main power source.

10 That is not the only requirement. There is a
11 second one. The power source also has to be connected to
12 supply power to the data node.

13 And you can see on the right that in every one of
14 HP's switches there are two separate power supplies shown in
15 teal and orange on the left side. Neither one of those power
16 sources does both of these claim requirements.

17 This is Mr. Dowling. He is the vice president of
18 engineering at Hewlett-Packard.

19 QUESTION: Is there one power supply that powers
20 both the switchboard and the PoE board in the HP Power over
21 Ethernet switches?

22 ANSWER: No.

23 This is Mr. Tremblay, HP's resident expert on PoE.

24 QUESTION: Is there any one PoE switch that
25 Hewlett-Packard makes where one power supply provides power

1 both to the switch circuitry and also delivers the detection
2 current?

3 ANSWER: No, ma'am, there is no power supply that
4 can do that.

5 Mr. Tremblay again. But not one of those would do
6 the functions of powering the data node and delivering
7 detection current?

8 ANSWER: Absolutely not. There is no way that one
9 power source can do both of those functions.

10 Now, during trial Dr. Knox, Network-1's expert, at
11 times drew a big red box around multiple power supplies and
12 called them one power supply. And our expert addressed that.
13 Dr. Davis testified about that specifically.

14 He was asked:

15 QUESTION: Dr. Knox has at times suggested that the
16 12-volt and 50-volt power sources are really just one power
17 source with two outputs?

18 ANSWER: He is not correct that this represents one
19 power supply, no.

20 He went on to explain.

21 Why not?

22 The 12-volt power supply and the 50 volt-power
23 supply are isolated from one another.

24 What does that mean?

25 They're isolated so that the voltages and the

1 currents on one supply can't interact with the voltages and
2 currents on the other one, primarily for safety.

3 Their own expert agreed with this in his
4 deposition. And this came out at trial. So this is
5 Mr. Ferguson asking Dr. Knox.

6 Okay -- this is me asking you -- if we look back at
7 what's on the power supply board, is it true that there are
8 two separate power supplies on that board? You say -- and
9 you kind of chuckled -- there are actually about eight. Do
10 you recall that?

11 ANSWER: I do.

12 QUESTION: But one of them, though, sends out
13 12-volt output, right?

14 ANSWER: That's correct.

15 QUESTION: And another of them sends out this
16 nominal 48- to 52-volt output, right?

17 ANSWER: That's correct.

18 Dr. Knox, their own expert, admitted that on our
19 power supply boards it is not one power supply, it is
20 multiples power supplies, none of which performs both
21 requirements of the claims of the main power source.

22 Now, Network-1 in its reply brief states, quote:
23 Undisputed evidence demonstrates that two categories of
24 accused HP switches use a single power supply that performs
25 both required functions of the main power source.

1 That is simply incorrect. Here is a quote from
2 Mr. Dowling, question and answer, in which Mr. Dowling talks
3 about all of HP's switches, not just some of them.

4 QUESTION: Is there one power supply that powers
5 both the switchboard and the PoE board in the HP Power over
6 Ethernet switches?

7 ANSWER: No.

8 He is not talking about some of the power supplies,
9 as Network-1 suggests. He is talking about all of them.

10 That is true of Mr. Tremblay as well.

11 QUESTION: Is there any one PoE switch that
12 Hewlett-Packard makes where one power supply provides power
13 both to the switch circuitry and also delivers the detection
14 current?

15 ANSWER: No, ma'am, there is no power supply that
16 could do that.

17 He is talking about all of HP's accused products,
18 not just some of them.

19 Network-1 also states -- not today but in its
20 briefing -- if HP's single internal power supply were
21 actually two power supplies, HP would certainly have at least
22 one document supporting that fact.

23 The truth is we do have a document supporting that
24 fact, and we put it in front of the jury at trial. We
25 testified extensively about it. HP Power over Ethernet

1 Planning and Implementation Guide. And here is a quote from
2 it. Quote: One supply voltage provides power for the switch
3 functionality while the isolated voltage provides power for
4 the PoE functionality.

5 Mr. Dowling specifically was asked this question
6 about this particular quote.

7 QUESTION: What does that mean?

8 ANSWER: That means, basically, that we have two
9 power supplies that are isolated from each other. Two DC
10 power supplies.

11 So here is the one document. Here is a document
12 that supports our position that our products have multiple
13 power supplies.

14 So that provides a second independent basis for
15 upholding the jury's non-infringement verdict and denying
16 Network-1's motion.

17 Mr. Dovel spent a lot of time today talking about
18 no low level current. And according to Mr. Dovel, the Court
19 has to reweigh the evidence.

20 HP put in extensive evidence establishing that none
21 of our switches use a low level current that meets the
22 Court's claim construction.

23 As Your Honor is familiar, the term low level
24 current was construed as a non-data-signal current that is
25 sufficient to begin start up of the access device but that is

1 not sufficient to sustain the start up.

2 This demonstrative was presented at trial by
3 Dr. Davis and others. The Court's construction imposes a
4 lower bound where start up -- where the current must be
5 sufficient to begin start up, and an upper bound where the
6 current must be not sufficient to sustain the start up.

7 This is Dr. Davis. He concluded: HP's switches do
8 not deliver a current sufficient to begin start up of the
9 access device but not sufficient to sustain the start up.

10 Now, HP's theory of non-infringement with respect
11 to low level current is this: Our products comply with the
12 Power over Ethernet standard. The Power over Ethernet
13 standard specifically forbids detection currents from
14 beginning to start up an access device. And our witnesses
15 testified to that. I will show you some of that testimony.

16 But on this slide what is shown here is detection
17 and classification currents at the bottom, are required by
18 the PoE standard to have a voltage within certain ranges.
19 Detection currents must be between 2.8 and 10 volts.
20 Classification must be between 15.5 and 20.5 volts. And then
21 the turn on voltage has to be 30 or more. That is required
22 by the standard.

23 So this is Dr. Davis confirming that all of HP's
24 devices comply with the PoE standard. And Dr. Davis also
25 testified that the detection voltages, according to the PoE

1 standard, have to be between 2.8 and 10 volts.

2 This is a table from the standards, which was
3 marked as an exhibit and introduced to the jury, confirming
4 that detection voltages have to be between 2.8 and 10 volts.

5 Dr. Davis testified that a device, according to the
6 PoE standard, begins to start up when 30 volts or more are
7 applied. At that point it not only begins to start up, it
8 also sustains the start up. That is what the PoE standard
9 requires.

10 Now, I mentioned earlier, the PoE standard
11 specifically forbids what the '930 patent requires. It
12 forbids a device from beginning to start up without
13 sustaining start up, and that is provided right here, and our
14 witnesses testified about it.

15 Section 33.3.5.7 of the standard says: The PD
16 shall turn on or off without start up oscillation.

17 We asked Dr. Davis what that means. Dr. Davis
18 stated that this section is requiring the PD to start up and
19 sustain start up one time when you initially begin.

20 Dr. Davis also testified about a specific mechanism
21 that is used in HP's access devices called the undervoltage
22 lockout mechanism. Here he is saying that the undervoltage
23 lockout mechanism prevents all power, any power from being
24 delivered to the access device unless and until the voltage
25 associated with that power is at least 30 volts. The access

1 device receives no power under 30 volts. You need at least
2 30 volts. And detection happens from 2.8 to 10 volts. It is
3 too low.

4 Dr. Davis confirms that here. Nothing is delivered
5 to the access device until you get about 30 volts.

6 Mr. Dwelley is consistent with that. During the
7 time that detection is going on, is the operational circuitry
8 of a PD, an access device, is that receiving any power?

9 ANSWER: No.

10 THE COURT: Let me ask you this: How is that
11 consistent with the testimony from Tremblay that under --
12 that some components do work during the detection phase?

13 MR. MEHTA: Your Honor, it is correct that during
14 detection there is a portion of the device called the
15 detection circuitry. Mr. Dovel showed you and I mentioned
16 that. It contains a resistor, it contains a PoE chip, and
17 other components.

18 Those do consume power. That is correct. And he
19 showed you testimony from our witnesses where those devices
20 consume power during detection. That does not mean, however,
21 that the access device as a whole begins to start up. There
22 is a reason for that.

23 The PoE standard specifically forbids a device from
24 beginning to start up. It is a safety mechanism. You need
25 at least 30 volts for the device to begin start up and

1 sustain start up under the PoE standard. Again, all of our
2 devices comply with the PoE standard.

3 This is Dr. Davis confirming that point.

4 When the voltage of any current is sent and the
5 voltage is below 30, can any power get to the operational
6 circuitry?

7 ANSWER: None of it.

8 Dr. Davis following up on that.

9 If no power is going to the operational circuitry,
10 can the access device begin start up?

11 ANSWER: No, it cannot.

12 This is Dr. Davis summarizing.

13 We know that the access device has got to receive
14 the 30 volts and whatever current is associated with it, in
15 order to turn on and begin to operate, to begin start up. We
16 also know that that is enough to sustain its start up. But
17 we also know that the detection voltages and the
18 classification voltages are not enough to even begin the
19 start up of the access device.

20 Now, to Your Honor's question, the testimony that
21 Mr. Dovel showed you in his presentation today essentially
22 rewrites what the Court's construction requires. He focused
23 on the devices on the front end consuming power, beginning to
24 work. But that is simply not what the Court's construction
25 requires.

1 The construction is a non-data-signal current that
2 is sufficient to being the start up of an access device but
3 that is insufficient to sustain the start up.

4 We are focusing on beginning the start up of an
5 access device, not an individual component within that
6 device.

7 Network-1's testimony that an individual component
8 within the device can consume some power, it is simply not
9 germane to the construction of low level current.

10 And so ending where I started off, HP, despite not
11 having the burden to prove infringement, provided three
12 separate reasons for upholding the jury's verdict and for
13 denying Network-1's motion. Network-1's motion should be
14 denied.

15 Thank you.

16 THE COURT: Thank you, Mr. Mehta.

17 Short rebuttal, a minute or two?

18 MR. DOVEL: All right. I will do two minutes. How
19 is that then?

20 THE COURT: That will be fine.

21 MR. DOVEL: Appreciate it, Your Honor.

22 I will do just one point on the main power source.
23 HP argues that, well, we presented some testimony from our
24 witnesses saying that all of our switches are the same. They
25 presented that on direct, but Your Honor should not credit

1 that. And the reason is on cross-examination they explained
2 that that testimony was false.

3 Here is Mr. Tremblay. I talked to him about the
4 modular switches where he admitted that all of the power from
5 the switch comes from a single power supply.

6 Here is his testimony.

7 Would you agree that all of the power that is
8 consumed inside that switch, whether it is for the switch or
9 for detection or whatever, comes through that DC output of
10 that single power supply?

11 ANSWER: Yes, sir.

12 Then I asked him this question, this is decisive,
13 Your Honor: Why didn't you tell the jury that in your direct
14 examination?

15 ANSWER: We did not talk about this particular
16 power supply in the direct examination.

17 So what he is saying is, when I said that they all
18 have two power supplies, I wasn't asked specifically about
19 this one. If I had, I would have told them, yeah, it is just
20 one power supply.

21 So they have testimony, generalized testimony that
22 they have two power supplies; but when you actually look at
23 the cross-examination, each of their witnesses, Dowling and
24 Tremblay and Dr. Davis admitted that, no, there is, in fact,
25 a single power supply for HP's switches that does both of the

1 required functions.

2 Thank you, Your Honor.

3 THE COURT: Thank you, Mr. Dovel.

4 All right. I appreciate the parties' presentations
5 this afternoon. I appreciate your understanding with respect
6 to my scheduling concerns in the morning. So I will look
7 forward to seeing you all as close to the noon hour as
8 possible. And we will start at that time.

9 All right. See you in the morning.

10 (Hearing adjourned.)

11

12

13 CERTIFICATION

14

15 I HEREBY CERTIFY that the foregoing is a true
16 and correct transcript from the stenographic notes of the
17 proceedings in the above-entitled matter to the best of my
18 ability.

19

20 /s/ Shea Sloan
21 SHEA SLOAN, CSR, RPR
22 Official Court Reporter
State of Texas No.: 3081
Expiration Date: 12/31/18

May 24, 2018

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